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THE LAW REPORTS

[1912] 1 King's Bench

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1912.

THE
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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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 DETERMINED BY THE
 KING'S BENCH DIVISION
 OF THE
 HIGH COURT OF JUSTICE
 AND BY THE
 COURT OF APPEAL
 ON APPEAL THEREFROM
 AND BY THE
 COURT OF CRIMINAL APPEAL
 AND BY THE
 RAILWAY AND CANAL COMMISSION.

JENKINS *v.* GREAT CENTRAL RAILWAY COMPANY.

1911

Nov. 1, 6.

Railway Company—Steam Vessels—Carriage of Goods wholly by Sea—Bill of Lading—Exception of Loss by Negligence of Master or Crew—Illegality of—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31.

The provisions of the Railway and Canal Traffic Act, 1854, which by s. 31 of the Railways Clauses Act, 1863, are extended to traffic carried by the railway company on steam vessels, apply to the case of carriage wholly by sea as well as to that of carriage partly by sea and partly by land; and, therefore, where goods are delivered to a railway company whose special Act incorporates the Railways Clauses Act, 1863, to be carried by them between two seaports only, a condition in the bill of lading that the company shall not be liable for loss caused by the negligence of the master or mariners in navigating the ship is void as being unreasonable.

Riggall v. Great Central Ry. Co. (1909) 14 Com. Cas. 259, followed.

TRIAL of action before Lord Coleridge J.

The action was brought to recover damages for non-delivery of a parcel of linen handkerchiefs, valued at 167*l.*, delivered by the

1911 <hr/> JENKINS v. GREAT CENTRAL RAILWAY.	<p>plaintiffs to the defendants at Grimsby to be carried on their steamship <i>Blackburn</i> from Grimsby to Antwerp. The goods were shipped under a bill of lading, dated December 7, 1910, containing a provision exonerating the defendants from liability for the consequences of "any act neglect default or error in judgment whatsoever of the pilot master or mariners in navigating the ship." The <i>Blackburn</i> sailed from Grimsby on December 7, and on the following day, owing in part to the negligence of those in charge of her, came into collision with another vessel and was sunk, her cargo being wholly lost. The defendants relied by way of defence on the exceptions in the bill of lading; and the plaintiffs replied that the conditions of the bill of lading were unjust and unreasonable, and were not signed by the plaintiffs. The goods were shipped by a firm of John Sutcliffe & Son, who were the shipping agents of the defendant company; and on December 7 Messrs. Sutcliffe sent to the plaintiffs a copy of the printed bill of lading containing the exception above mentioned and bearing at the foot the following words, also in print: "Sir,—Herewith we beg to hand you bill of lading of goods shipped on board the above steamer, which sails to-night. Soliciting a continuance of your shipments by this route, Yours respectfully, John Sutcliffe & Son." The plaintiffs did not pay Messrs. Sutcliffe for superintending the shipment of the goods.</p>
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The defendants are the successors and transferees of the undertaking of the Manchester, Sheffield and Lincolnshire Railway Company. By the Manchester, Sheffield and Lincolnshire Railway Act, 1864 (27 & 28 Vict. c. cccxx.), the company was authorized to "use maintain and work . . . steam and other vessels for the purpose of carrying on a convenient and efficient communication by means thereof between the town or port of Great Grimsby and the towns or ports of Rotterdam, Antwerp" and other places, and to take tolls and charges in respect of such steam vessels. By that Act Part IV. of the Railways Clauses Act, 1863, relating to steam vessels, was incorporated, by s. 30 of which "Where a railway company incorporated either before or after the passing of this Act is authorised by a special Act hereafter passed and incorporating this part of this Act . . . to use

maintain and work . . . steam vessels for the purpose of carrying on a communication between any towns or ports and to take tolls in respect of such steam vessels, then and in every such case tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances ; and no reduction or advance in the tolls shall be made in favour of or against any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part thereof." And by s. 31 "The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels, and to the traffic carried on thereby." By the Railway and Canal Traffic Act, 1854, s. 2, "Every railway company . . . shall . . . afford all reasonable facilities for the receiving forwarding and delivering of traffic upon and from the several railways . . . belonging to or worked by such companies respectively . . . and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person." And by s. 7 "Every such company as aforesaid shall be liable for the loss of . . . any articles goods or things in the receiving forwarding or delivering thereof occasioned by the neglect or default of such company or its servants notwithstanding any notice condition or declaration made and given by such company contrary thereto or in anywise limiting such liability ; every such notice condition or declaration being hereby declared to be null and void ; provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving forwarding and delivering of any of the said . . . articles goods or things as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable ; . . . provided also that no special contract between such company and any other parties respecting the receiving forwarding or delivering any . . . articles goods or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person

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 JENKINS
 v.
 GREAT
 CENTRAL
 RAILWAY.

1911 delivering such articles goods or things respectively for carriage."

JENKINS

v.

GREAT
CENTRAL
RAILWAY.

By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 16, the provisions of ss. 30 and 31 of the Railways Clauses Act, 1863, are re-enacted in the same terms and made applicable to all railways that are authorized to use steam vessels.

By s. 59 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), so much of s. 16 of the Regulation of Railways Act, 1868, as extended the provisions of the Railway and Canal Traffic Act, 1854, to traffic carried on steam vessels was repealed.

Sankey, K.C., and *H. M. Robertson*, for the defendants. The provisions of s. 7 of the Railway and Canal Traffic Act, 1854, do not apply to the contract of a railway company for the carriage of goods by sea only. Down to 1863 that Act did not apply to a carriage by sea at all. It was confined to carriage upon a railway or a canal. And as in respect of such carriage upon a railway or a canal the company were given a monopoly, Parliament thought it right that restrictions should be imposed upon their power of dictating the conditions on which they would carry. When railway companies came to carry goods partly by land and partly by sea it was found more convenient to charge a through rate for the whole carriage instead of charging separately for the land and sea portions, and under those circumstances, as the company still had a monopoly in respect of part of the carriage, it was thought reasonable to extend the restrictions of the Act of 1854 to such a case; and that was done by s. 31 of the Railways Clauses Act, 1863, in the case of railways incorporating that Act in their special Act, and by s. 16 of the Regulation of Railways Act, 1868, in the case of all railways. But it is contended that those sections went no further and did not apply to cases where no part of the transit was by land. For it would be most unreasonable if they did, the company having no monopoly in such cases. To hold that s. 7 applied would be to place the railway company, without any reason for

so doing, at a great disadvantage in their competition with other shipowners who were not bound by any such restrictions.

Secondly, if the provisions of the Act of 1854 ever applied to carriage wholly by sea they do so no longer, for the enactments so applying them are repealed. Sect. 31 of the Railways Clauses Act, 1863, only applied those provisions to such railways as incorporated the Act of 1863 in their special Act. Sect. 16 of the Act of 1868 applied them to all railways, including those which had adopted the Act of 1863. In so doing the Act of 1868 absorbed and impliedly repealed s. 31 of the Act of 1863, and as the material portion of s. 16 of the Act of 1868 has been itself repealed by s. 59 of the Railway and Canal Traffic Act, 1888, the defendants are no longer bound by the provisions of the Act of 1854 so far as their traffic on steam vessels is concerned.

Thirdly, if the application of that Act to steam vessels is still in force the conditions of s. 7 were satisfied. The exception of negligence was under the circumstances reasonable. For many years past it has been the general practice to introduce such an exception into bills of lading, and the fact that bills of lading containing that exception have been accepted by shippers is some evidence that it is not unreasonable. It is true that in *Doolan v. Midland Ry. Co.* (1) a similar exception was held unreasonable. But the decision in that case was before the general introduction of the negligence clause into bills of lading, and, further, part of the carriage there was by land, so that the defendants had a monopoly, a matter which ought to be taken into consideration upon the question of reasonableness. In *Riggall v. Great Central Ry. Co.* (2), where the circumstances were admittedly undistinguishable from the present case, Pickford J. held the contract to be unreasonable. But it is contended that that case was wrongly decided. With regard to the necessity of the contract being signed by the consignor it is enough that the bill of lading was signed by Sutcliffe & Son. They acted as agents for both parties. In *Riggall's Case* (2) Pickford J., though he did not decide the point, assumed in favour of the defendants that a similar signature was sufficient.

(1) (1877) 2 App. Cas. 792.

(2) 14 Com. Cas. 259.

1911

JENKINS
v.
GREAT
CENTRAL
RAILWAY.

1911

JENKINS
v.
GREAT
CENTRAL
RAILWAY.

Radcliffe, K.C., and *Liversedge*, for the plaintiffs. Sect. 31 of the Act of 1863 is still in force notwithstanding the repeal of s. 16 of the Act of 1868. The fact that an extending Act has been repealed cannot affect the Act extended. Secondly, if it is still in force it makes the provisions of the Railway and Canal Traffic Act, 1854, applicable to carriage on board a steamer even though no part of the carriage was by railway. It speaks of "*the steam vessels.*" That refers to the preceding section, s. 30, which provides for equality of treatment in the matter of tolls taken for the carriage of passengers on board the company's steamers whether the persons so carried have travelled or are about to travel on any part of the company's railway or not. Equality of treatment is the subject of one of the sections of the Act of 1854. The Act of 1863 in s. 30 therefore expressly contemplates the application of one part of the 1854 Act to a case of carriage wholly by sea. The presumption is that where in s. 31 it extended the provisions of the Act of 1854 generally to steam vessels it equally meant all those provisions to apply to a case of carriage wholly by sea. Thirdly, it cannot in this Court be disputed that the exception of negligence was unreasonable. The case is covered by the authority of *Riggall's Case*.⁽¹⁾ Further the bill of lading was not signed by or on behalf of the plaintiffs. Sutcliffe & Son were not the plaintiffs' agents. They paid them nothing for shipping the goods on board.

Cur. adv. vult.

1911. Nov. 6. LORD COLERIDGE J. read the following judgment:—In this case the plaintiffs, who are merchants at Belfast, despatched goods by sea to Grimsby for carriage, thence by sea by the defendants, by the steamship *Blackburn*, to consignees at Antwerp. Messrs. Sutcliffe & Son signed the bill of lading at Grimsby. It was contended by the plaintiffs that they signed the bill of lading as agents for the defendants, not as agents for the plaintiffs. The bill of lading contained the following exception:—"Any act, neglect, default or error in judgment whatsoever of the pilot, master or mariners in navigating the ship, the

(1) 14 Com. Cas. 259.

owners of the ship being in no way liable for any of the consequences of the causes above excepted."

The steamship *Blackburn* sailed from Grimsby on December 7, and that night foundered owing to a collision in which both ships were to blame, and the goods were lost. The question is whether the defendants are liable for the loss.

The first point is whether s. 7 of the Railway and Canal Traffic Act, 1854, applies, and whether the provisions in s. 7 are applicable to the case. [The learned judge read the section.]

It is said by the defendants that this section does not apply, and for this reason: the Railway and Canal Traffic Act, 1854, only applied to land carriage and canal navigation, and this is neither.

Historically, dealing with this point, I come to the Railways Clauses Act of 1863, which by Part IV. applies to steam vessels, and s. 31 enacts that "the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels, and to the traffic carried on thereby." That therefore makes the provisions of the Railway and Canal Traffic Act, 1854, contained in s. 7 applicable to the Railways Clauses Act, 1863, which deals in Part IV. with steam vessels. Then by a private Act in 1864, the year after the Railways Clauses Act came into operation, the defendants, who were then the Manchester, Sheffield and Lincolnshire Railway, by s. 2 incorporated Part IV. of the Railways Clauses Act, 1863, with the private Act, and it was made to form part of the private Act. If the matter rested there, no dispute could arise as to whether or not the provisions of s. 7 of the Railway and Canal Traffic Act, 1854, were applicable to steam vessels, for by s. 31 of the Act of 1863 those provisions were extended to that nature of carriage. The Act of 1863, however, was a clauses Act not applicable generally, but only to such persons as chose to incorporate it, and thereby gain the benefit of its provisions.

Next in order of date came the Regulation of Railways Act, 1868, which was a public Act of general application to railways, and by s. 16 of that Act it was enacted that "the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are

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applicable, shall extend to the steam vessels, and to the traffic carried on thereby." It therefore took the clause above quoted out of the Act of 1863 and embodied it in the Act of 1868. The identical clause to which I am referring then remained in both Acts.

I come to the next point: After 1868 came the Railway and Canal Traffic Act of 1888, and that repealed the above provision, namely, that portion of s. 16 which I have quoted in the Act of 1868. What is the effect of that repeal? The identical clause remained at one time in both Acts, it remained in the private Act and it remained in the Act of 1868: it remained in the Act of 1863 applicable to those companies which incorporated that Act in their private Act, and it remained in the Act of 1868 applicable also to those which did not. Is the effect of this course of legislation to strike out of the defendants' private Act the incorporated clause from the Railways Clauses Act of 1863? I have had no authority quoted to me to shew that the one is merged in or absorbed by the other. No authority has been quoted to me for the proposition that where a clause from a public Act has been incorporated with and forms part of a private Act, that part of the private Act is repealed by a subsequent repeal of the public Act.

A local and personal Act may incorporate into its clauses the provisions of a former Act although that former Act has been repealed (*Boden v. Smith and Others*) (1)), and the repeal of a statute does not repeal such portions of the statute as have been incorporated into another statute (*Clarke v. Bradlaugh*) (2)). Nor in general is a local Act of Parliament in the absence of any indication of intention on the part of the Legislature repealed or superseded by a general Act subsequently passed (*Fitzgerald v. Champneys*) (3).

Here the Act of 1888 expressly repeals only the portion of s. 16 of the Act of 1868 which was taken from s. 31 of the Act of 1863. In the first place, s. 31 of the Act of 1863 is not expressly repealed by the Act of 1888. It can only be said to be impliedly repealed because similar words in the Act of 1868 have

(1) (1849) 18 L. J. (C.P.) 121.

(2) (1881) 8 Q. B. D. 63.

(3) (1861) 30 L. J. (Ch.) 777.

been repealed. There is therefore no indication of intention on the part of the Legislature to repeal s. 31 of the Act of 1863. It cannot be said that the reason is because s. 31 of the Act of 1863 was already repealed by the Act of 1868. You do not repeal an Act by putting words from that Act into a later Act. I have already said that I can find no authority for the doctrine of merger or absorption, and under such circumstances I think the legal effect is to leave the defendants bound by the private Act and their incorporation into it of the Act of 1863 so far as it applies to this case.

Then it follows that the Railway and Canal Traffic Act, 1854, is still in force, with the extension of s. 7 of that Act to steam vessels under Part IV. of the Act of 1863. Does that include sea carriage simpliciter, or only carriage by sea where carriage by land forms one part of a continuous transit? I can see no valid ground in the statute for such a limited interpretation. Sect. 30 of the Act of 1863 contemplates carriage from port to port, and I can see no valid reason for putting so absurd a construction on the statute as to say that it applies where the whole carriage except an infinitesimal portion is by sea, yet that infinitesimal portion of the carriage by land is necessary to make the Act apply.

On these grounds I must hold that s. 7 of the Act of 1854, as enlarged by the Act of 1863, applies to carriage by sea only.

If so, are the conditions of the contract of carriage reasonable? It was not seriously contended that they were. Without giving an alternative rate, the defendants exempted themselves from all liability for damage due to their own negligence, and I do not think the conditions in the bill of lading binding on the plaintiffs. Whether Sutcliffes signed the bill of lading as agents for the plaintiffs or for the defendants, or for both, seems to me to be in this aspect immaterial, but I have arrived at the conclusion that they were agents for the defendants at any rate. They so describe themselves on their notepaper, and they write on January 9, 1911, saying, "We say we do make the statement 'the ship is not responsible' as authorised agents of the railway company," and the plaintiffs do not pay any commission

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for their services to Messrs. Sutcliffe as forwarding agents. There must be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Leader, Plunkett & Leader.*

Solicitor for defendants : *D. H. Davies.*

J. F. C

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Oct. 24.

KNIGHT v. CITY OF LONDON BREWERY COMPANY.

Licensing Acts—Compensation Charge—Deduction from Rent—Unexpired Term—Reversionary Lease—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3 and Sched. II.

In 1875 the owner of licensed premises let them to a tenant for a term of forty years. In 1888 by a deed which recited an agreement to grant an extension of the lease he demised the premises to the tenant for a term of twenty-one years to commence immediately on the expiration of the forty years term at the same rent and subject to the same covenants as specified in the original lease. In 1897 by a deed which recited an agreement to grant a further extension of the lease he demised the premises for a further term of fifteen years to commence immediately at the expiration of the twenty-one years term at the same rent and subject to the same covenants. Both these two last-mentioned leases contained a proviso that in the event of the forfeiture of the original lease they should be forfeited also. In 1910 the quarter sessions on the renewal of the tenant's licence imposed a compensation charge in respect of the premises under s. 3 of the Licensing Act, 1904:—

Held, that, for the purpose of determining the amount of the tenant's "unexpired term" in the premises on the basis of which he was entitled to deduct a percentage of the compensation charge from his rent under that Act, the original lease and the extensions could not be treated as one term, and that the deduction must be regulated by the unexpired portion of the original lease alone.

Lord Llangattock v. Watney & Co. [1910] A. C. 394, held undisturbable.

SPECIAL CASE.

The action was brought to recover the sum of 39*l.* 7*s.* 6*d.* as one quarter's rent due to the plaintiffs in respect of certain licensed premises in High Street, Clapham, in the county of

Surrey, known as "The Two Brewers" public-house, after deducting income tax under Sched. A and the amount which the plaintiffs alleged was the landlord's proportion of the annual compensation charge payable in respect of the said premises under the Licensing Act, 1904.

The plaintiffs were the trustees of the will of Sarah Elgee, deceased (widow of Jeremiah Elgee), and as such were entitled to receive the rent of the licensed premises reserved in the indentures of lease hereinafter mentioned, dated respectively May 12, 1875, February 9, 1888, and December 3, 1897. The defendants were by assignment underlessees of the said premises under the said indentures.

By an indenture of lease dated December 5, 1873, the said licensed premises were demised to Edward Elgee for a term of eighty years from December 25, 1872.

By an indenture of underlease dated May 12, 1875 (hereinafter referred to as the said underlease), Edward Elgee demised the premises to David Devenish for a term of forty years from March 25, 1875, at a yearly rent of 180*l*.

Edward Elgee died on November 26, 1878, having bequeathed his interest in the licensed premises to his son Jeremiah Elgee.

Jeremiah Elgee died on March 27, 1882, having bequeathed his interest in the licensed premises to his widow, Sarah Elgee.

At the date of the making of the indenture next hereinafter mentioned the interest of David Devenish in the said licensed premises as underlessee was vested by assignment in William Dibbs. By indenture dated February 9, 1888 (hereinafter referred to as the first reversionary underlease), reciting an agreement to grant an extension of the said underlease, Sarah Elgee granted to William Dibbs an extension of the aforesaid underlease from March 25, 1915, being the date of the determination thereof, for a term of twenty-one years subject to the like rent and conditions as were reserved and agreed by the said underlease.

At the date of the making of the further indenture next hereinafter mentioned the whole of the interest of William Dibbs in the licensed premises had become vested by assignment in William Tyler. By an indenture dated December 3, 1897

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(hereinafter referred to as the second reversionary underlease), reciting an agreement to grant an extension of the said underlease and first reversionary underlease, Sarah Elgee granted to William Tyler an extension of the said underlease and first reversionary underlease for a term of fifteen years from March 25, 1936, being the date of the expiration of the first reversionary underlease, subject to the like rent and conditions as were reserved and agreed by the said underlease.

In the aforesaid first reversionary underlease it was expressly provided "that if the said term of forty years granted by the said lease shall be determined by virtue of the condition or provision for re-entry therein contained then these presents shall be absolutely void," and in the aforesaid second reversionary underlease it was similarly expressly provided that if the term of forty years granted by the said underlease or if the said term of twenty-one years granted by the said first reversionary underlease should in like manner be determined the second reversionary underlease should be absolutely void.

Sarah Elgee died on February 6, 1902, and all her interest in the licensed premises became vested in the plaintiffs as trustees of her will.

In 1903 the interest of William Tyler in the said underlease and reversionary underleases became vested by assignment in the defendants, who thenceforward continued to be tenants to the plaintiffs.

By s. 3 of the Licensing Act, 1904, quarter sessions are for the purpose of forming a compensation fund empowered to impose a certain charge upon all existing on-licences renewed in respect of premises within their area, and by sub-s. 3 such deductions from rent as are set out in the Second Schedule to the Act may be made by any licence holder who pays a charge under the said section and also by any person from whose rent a deduction is made in respect of the payment of such a charge. The scale of deductions enacted by Sched. II., so far as is material to this case, is as follows :—

"A person whose unexpired term does not exceed	5 years may deduct a sum equal to	70 per cent. of the charge."
"A person whose unexpired term exceeds 35 but does not exceed	40 years may deduct a sum equal to	5 per cent. of the charge."

In the year 1910 the quarter sessions for the county of Surrey, in the Newington division of which the said licensed premises are situate, imposed under s. 3 of the said Act a compensation charge of 60*l.* in respect of the said licensed premises, and the said charge was in or about the month of October, 1910, paid by the licence holder of the said premises, and the licence holder made such deductions from the rent paid by him to the defendants on December 25, 1910, as are authorized by s. 3 and Sched. II. of the said Act.

The plaintiffs contended that the percentage of the compensation charge which the defendants were entitled to deduct was 5 per cent. (amounting to 3*l.*) and no more, on the ground that the defendants were persons whose "unexpired term" exceeded thirty-five years but did not exceed forty years within the meaning of the schedule, and the plaintiffs accordingly claimed in respect of the quarter's rent the sum of 39*l.* 7*s.* 6*d.*, being 45*l.* less 2*l.* 12*s.* 6*d.* income tax and 3*l.* compensation charge.

The defendants on the other hand contended that they were entitled to deduct from the rent due to the plaintiffs 70 per cent. of the compensation charge (amounting to 42*l.*) on the ground that they were persons whose unexpired term did not exceed five years within the meaning of the schedule, and that the plaintiffs were entitled to the balance of 7*s.* 6*d.* and no more.

Bruce Williamson, for the plaintiffs. The original term of forty years and the two extensions of twenty-one years and fifteen years constituted for the purposes of the Act of 1904 one term, which would not expire till 1951, and consequently the defendants' unexpired term had at the date of the rent falling due at least thirty-nine years to run. The defendants will rely on the case of *Lord Llangattock v. Watney & Co.* (1) But that case is distinguishable. There the intention of the parties was that the lease and the reversionary lease should not coalesce into one term, for one day's interval was provided between the expiration of the lease and the commencement of the reversionary lease, whereas here the reversionary leases are expressly stated to be granted in pursuance of agreements to grant extensions of the

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forty years term, and the three leases are accordingly made to run continuously without any break. In that case a fresh entry by the tenant would have been necessary to convert the tenant's right under the reversionary lease into an estate, whereas here no such entry would be necessary, for the possession of the tenant would never have ceased. Moreover in the present case the reversionary leases both contained a proviso that in the event of the original lease being determined by re-entry the extensions also should be determined; whereas in *Lord Llangattock's Case* (1) the reversionary lease contained no such proviso, but expressly provided that it should commence from the day but one next after the date of the "expiration or sooner determination" of the original lease, so that if the latter were determined by re-entry the reversionary lease would still be subsisting. The intention of the parties then here having been to create one extended term, and to put the tenants in the same position as if there had been a surrender of the original lease and a regrant for the longer period, the Court will give effect to that intention.

G. F. Mortimer, for the defendants. The case is covered by *Lord Llangattock v. Watney & Co.* (1) A reversionary lease merely creates an *interesse termini* until the tenant is in possession under it; it does not enlarge the term of the original lease: *Lewis v. Baker*. (2) It makes no difference that the reversionary lease follows directly upon the expiration of the original lease instead of being separated from it by an interval of time. In *Lewis v. Baker* (2) the reversionary lease was expressed to commence immediately on the expiration of the original lease, and it was contended, as here, that no fresh entry would be necessary, but the Court held that the two leases could not unite to form one term. In *Lord Llangattock v. Watney & Co.* in the Court of Appeal (3) Cozens-Hardy M.R. said that he did "not lay any great stress upon the intervening period of a day," but went on the ground that the words "unexpired term" were words of art which must be given a strict legal construction. It is not possible in law to extend a term except by means of a surrender and regrant.

(1) [1910] A. C. 394.

(2) [1905] 1 Ch. 46.

(3) [1910] 1 K. B. 236, at p. 243.

Bruce Williamson in reply. In *Lord Llangatock's Case* (1) the Master of the Rolls conceded that the intervening period of a day was "not to be wholly disregarded," and when that case came before the House of Lords Lord Loreburn L.C. (2) laid considerable stress on the inconvenience that would arise if the unexpired term could be held to include discontinuous periods separated possibly by an interval of years, shewing that he did attach importance to the terms not being continuous. In *Lewis v. Baker* (3) a lessee with an original lease and a reversionary lease underlet the premises for a term exceeding the original lease, and all that that case decided was that the two leases could not be treated as one for the purpose of leaving a reversion in the lessee and so entitling him to exercise the peculiar remedy of distress. It is quite another thing to say that they could not be treated as one for the purposes of the Licensing Act, 1904.

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A. T. LAWRENCE J. But for the case of *Lord Llangatock v. Watney & Co.* (4) I should have been of opinion that the landlord was right here and that the original lease and the two reversionary leases should be regarded as one term. However I have got to accept the law as laid down in that case, and that seems to decide that I am not entitled to look at the justice of the case at all, but must construe the words "unexpired term" in Sched. II. according to their strict legal meaning, and, as Lord Shaw there said, it is to the existing lease alone that the word "term" so construed can apply. It is to my mind clear that the original lease for forty years is still in existence. The form in which the extensions have been made is that of demises which are respectively to take effect on the expiration of the immediately preceding lease, and according to the decision of the House of Lords it is to the form and not to the substance of the thing that I have to look. By that decision I am bound. The original lease being still subsisting the rent due seems to be payable under that lease alone and not under the reversionary leases at all. Therefore the deduction has got to be regulated by the period of the original term and not by the extended

(1) [1910] 1 K. B. 236, at p. 243.

(2) [1910] A. C. at p. 396.

(3) [1905] 1 Ch. 46.

(4) [1910] A. C. 394.

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period. It is unfortunate that it should be so, because it works a serious injustice, but that cannot be helped.

Judgment for defendants.

Solicitor for plaintiffs: *Morton L. Knight.*

Solicitors for defendants: *Western & Sons.*

J. F. C.

C. A.

[IN THE COURT OF APPEAL.]

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Oct. 13.

PHILLIPS v. VICKERS, SONS & MAXIM.

Employer and Workman—Compensation—Injury occasioned by Accident—Incapacity—Voluntary Payment of Compensation—Implied Agreement—Right of Workman to have Agreement recorded—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3; Sched. II. (9.).

A workman was injured by an accident in August, 1909. His employers, without any proceedings for compensation having been taken, admitted the accident and paid the workman 16s. 3d. a week, being half his wages, and said that they would continue to do so as long as their own doctor certified that total incapacity continued. In January, 1911, the workman applied to have recorded an alleged agreement whereby the employers agreed to pay him the weekly sum of 16s. 3d. during incapacity caused by the accident. The employers opposed the application on the grounds (1.) that no such agreement had been made, and (2.) that no question had arisen to give jurisdiction under s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906. The county court judge ordered a memorandum of the alleged agreement to be registered:—

Held, on appeal, that there was no evidence to support the alleged agreement, and no such agreement could be implied from the fact that the employers had paid compensation and were willing to continue the same so long as their own doctor should certify the incapacity.

APPEAL from an order of the judge of the Dartford County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The workman was injured by an accident on August 26, 1909, while in the employment of the appellants. The appellants, without any proceedings for compensation having been commenced, admitted the accident and paid the workman half

wages, and said that they were willing to continue doing so upon the certificate of their own doctor so long as total incapacity lasted. On January 31, 1911, the workman applied to the county court, under Sched. II. (9.) of the Workmen's Compensation Act, 1906, to have recorded the following memorandum of an agreement which he alleged had been come to between the appellants and himself :—

“Be it remembered that on the 26th day of August, 1909, personal injury was caused at the respondents' works at Erith to the above named Charles Phillips, a workman under no legal disability, by accident arising out of and in the course of his employment. And that on the 18th day of October, 1909, the following agreement was come to by and between the said A. C. Phillips and the said Vickers, Sons & Maxim, Limited; that is to say :

“(1.) The employer admits (a) That the workman was in the employment of the employer on the date above mentioned and that on that date personal injury was caused to the workman by accident arising out of and in the course of his employment. (b) That from the date of the said accident to the present time the workman has been totally incapacitated for work and that such incapacity is continuing. (c) That the workman is a workman to whom the above mentioned Act applies and that the employer is liable to pay compensation to the workman in accordance with the provisions thereof.

“(2.) The employer agrees to pay to the workman the sum of 16s. 3d. every week from the date of the said accident.”

The appellants opposed the application on the grounds (1.) that no agreement had been made by the parties as alleged, or at all, and (2.) that no question had arisen as to the liability to pay compensation or as to the amount or duration within the meaning of s. 1, sub-s. 3, of the said Act. The county court judge ordered the memorandum to be registered, and from that order the employers appealed.

J. Sankey, K.C., and *T. Mathew*, for the appellants. No question has arisen in this case in any proceedings under the Act as to the liability to pay compensation or as to the amount or

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duration of compensation. The county court judge had, therefore, no jurisdiction to make the order appealed from: Workmen's Compensation Act, 1906, s. 1, sub-s. 3. Moreover, no such agreement as the applicant alleges was entered into by the appellants. They have always been willing to pay compensation so long as their doctor certified that total incapacity existed. That is not the agreement which it is sought to have registered.

Hume Williams, K.C., and *J. D. Cassels*, for the respondent. The order appealed from is right. The question which has arisen is whether there was an agreement or not. That question has to be tried by the county court judge and gives rise to his jurisdiction. [*Field v. Longden & Sons* (1) and *Jones v. Great Central Ry. Co.* (2) were referred to.]

No reply was called for.

COZENS-HARDY M.R. This appeal raises a curious and rather important point. A workman in the employment of Messrs. Vickers, Sons & Maxim met with a serious accident which for a time at all events totally disabled him from work. The firm had their own doctor, to whom they required the man to go, and upon whose certificate of the workman's disability they paid him 16s. 3d. per week. It is clear upon the correspondence that they said they would not make the payment in the absence of the certificate. The evidence of the workman shews that he made fortnightly visits to the firm's doctor to obtain the certificate before he got his payment. A receipt which was put in evidence was for four weeks' payment after the certificate of the doctor had been produced. That being the state of things the workman applied for registration of an agreement which he alleged was come to between himself and the company on October 18, 1909. [The Master of the Rolls read the agreement above set out, and continued:] Now we are asked to say that there was an agreement come to at that date to that effect between these parties. No doubt an agreement can be implied, and has constantly to be implied, in the absence of writing, by course of conduct, but not only is there no course of conduct here to justify that, but the evidence satisfies me at all events beyond a moment's doubt that the only agreement

(1) [1902] 1 K. B. 47.

(2) (1901) 18 Times L. R. 65.

made by Messrs. Vickers, Sons & Maxim with this man was that "so long as our works-doctor whom you will see once a fortnight certifies that your disability continues we will agree to pay you 16s. 3d. a week"; but to say that that means "We admit our liability to pay to you 16s. 3d. a week whether you go to the doctor or not, whether the doctor certifies that in his opinion you are fit to go to work or not"—if on the balance of evidence the county court judge differed from the works-doctor and took another view—seems to me to put into the mouth of the parties here an agreement which the employers never made or contemplated and which I am quite sure they never would have assented to. I hope it will not be imagined that in any way I desire to minimize the importance of these agreements, or to dissent from or object to their registration. I think they are most reasonable, and that the proper form of agreement is that which is found in the case of *Jones v. Great Central Ry. Co.* (1), where the employers said "We are paying you the full weekly allowance and these payments will continue during disability." If that had been the agreement made here, it would have been quite right and proper to register it, but no such agreement was made here. The particular form does not seem to have attracted the notice of the learned county court judge, and I am bound to say that I see no justification for keeping on the register the agreement which has been put there. Then it is said by the workman that if he cannot get this agreement registered he ought to get an award. It is sufficient to say that that is not a matter before us to-day. The only matter before us under appeal is an application to deal with a case for registration of an agreement. Nothing that is said by us here to-day will have any bearing either for or against any application which the workman may make to obtain an award on the ground that a dispute has arisen. It must not be supposed that anything that has fallen from any member of the Court, certainly not from me, is intended to prejudice that question if and when it comes forward. That will be dealt with by the Court entirely without prejudice from anything that has happened here. The only thing we can do with this appeal is to allow it with the usual consequences.

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FLETCHER MOULTON L.J. The only point before us is whether the judgment of the learned county court judge directing the enrolment of a particular agreement is one which can be sustained in law. I agree with the Master of the Rolls that there is no evidence upon which such an agreement could be inferred by him, and that therefore the appeal must be allowed. It should be remembered that when an agreement is inferred it does not mean that the Court makes an agreement which the parties have not themselves made. It simply means that the Court recognizes an agreement which they have made but have not recorded—not reduced into writing. The consent of both parties is as necessary for an agreement that you infer as it is for an agreement that is reduced into writing. It is only a question of the evidence by which the Court comes to the conclusion that such and such an agreement has been made by the parties. In this case we have only to take the evidence of the man himself to make it clear that Vickers, Sons & Maxim never made or intended to make, or allowed any one to think that they had made an agreement that they would pay this compensation until the county court judge was satisfied that the incapacity had ceased. The workman was sent regularly once a fortnight to their works-doctor, and when they got the certificate that the incapacity still continued, then and then only they paid. I will not trouble myself to decide whether one could say that there was an agreement that they would continue to pay this compensation so long as these fortnightly certificates of the works-doctor were received, because that is not before us. The question before us is a question whether this particular agreement was rightly registered. In coming to the conclusion that it was not, I may say that I think it would be most disastrous to workmen if we were to hold that the mere fact that during periods of undoubted incapacity the employers paid the full compensation without driving the workman to legal proceedings was to be taken as evidence that they had agreed to pay that compensation for any period of time or that they had agreed to the registration of an agreement under the Act that they would pay it during the disability. The effect of such a decision would be that employers would not be willing to pay compensation during the time they

were satisfied that there was incapacity, and workmen would be driven to proceed to law. The mere fact that an employer pays when he feels that compensation is clearly due does not, in my opinion, justify the Court in coming to the conclusion that an agreement to do it for any future time has been come to.

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FARWELL L.J. I have come to the same conclusion. Not only is the evidence contrary to the existence of any such agreement as has been registered, but the learned county court judge has not made any finding or reference to the details of the particular agreement which he ordered to be registered. He says, in a note which I have before me, "I therefore hold as a fact that the amount of compensation under the Act has been ascertained by agreement between the parties to be 16s. 3d. a week." With that I agree. I think the award for that sum has been given and nobody quarrels with it; but the agreement which he has ordered to be registered is an agreement to pay to the workman 16s. 3d. every week from the date of the accident and without limit of time. But it has been already paid down to date, and the letters which are put in evidence shew clearly that the agreement as to amount is subject to the condition that the payments will be made so long only as the workman submits himself to examination by the works-doctor and the works-doctor certifies that he is still incapacitated. Then is there any agreement at all that can be registered? There was an agreement as to the amount, subject to a condition precedent to paying that amount. That condition has been disregarded. The judge has dealt in his finding not only with the amount, but he has gone far beyond that and has registered something which is a contradiction of the real agreement between the parties. An agreement is an agreement whether it be partly in writing, or partly verbal, or partly to be inferred from the conduct of the parties or otherwise. Here the evidence is all one way. There is no finding or evidence at all to shew the existence of any such agreement as is embodied in the document which has been filed. I cannot help thinking that the learned county court judge's attention was not called to the contents of that document. He does not refer to it in the

C. A. shorthand notes to which our attention was drawn nor in the
 1911 notes which we have before us. I agree that there has been a
 PHILLIPS miscarriage of justice, and that therefore the appeal must be
 v. allowed.
 VICKERS, *Appeal allowed.*
 SONS &
 MAXIM.

Solicitors: *Bircham & Co.; G. Archibald Whigham.*

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[IN THE COURT OF APPEAL.]

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VICTOR MILLS, LIMITED v. SHACKLETON.

Oct. 17.

*Employer and Workman—Injury occasioned by Accident—Compensation—
 Weekly Payment—Redemption by Lump Sum—Method of Assessment—
 Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched I. (13.).*

A workman was totally and permanently incapacitated for work as the result of an accident in 1906, and was awarded compensation under the Workmen's Compensation Act, 1897, at the rate of 16s. 1d. per week, under which award he had received 179l. 6s. 7d. In 1911 the employers applied to have the weekly payment redeemed by a lump sum. The county court judge assessed the sum which would have been awarded to the workman by a jury for such an injury at the time of the accident at 300l. He then deducted from that sum the 179l. 6s. 7d. which the workman had already received in weekly payments, leaving a balance of 120l. 13s. 5d., which he awarded as the lump sum to be paid by the employers in redemption:—

Held, on appeal, that this method of computation was wrong.

APPEAL from a decision of the judge of the Lancashire County Court, sitting at Ashton-under-Lyne, upon an arbitration under the Workmen's Compensation Act, 1897.

The appellant was totally and permanently incapacitated as the result of an accident with which he met while in the employment of the respondents in December, 1906, and compensation had been paid to him at the rate of 16s. 1d. per week down to September 16, 1910. An award was subsequently made for payment of a weekly sum of 16s. 1d. from September 16, 1910. Under this award or previously to the making of it he had received in weekly payments the sum of 179l. 6s. 7d. On April 6, 1911, the respondents applied to have the weekly payments redeemed by the payment of a lump sum. The county

court judge assessed retrospectively the amount which would have been awarded by a jury to the appellant for such an injury as at the date of the accident, and fixed that amount at 300*l*. He then deducted from that sum the amount which the appellant had already received in weekly payments, namely, 179*l*. 6*s*. 7*d*., leaving a balance of 120*l*. 13*s*. 5*d*., which he awarded as the lump sum to be paid by the respondents in redemption.

The workman appealed.

F. B. Merriman, for the appellant. The county court judge in assessing the amount to be paid in redemption of the weekly payments has proceeded upon a wrong principle. The question of the amount already received in weekly payments is irrelevant and ought not to have been considered by him.

C. A. Russell, K.C., and *Sellers*, for the respondents. No question of law is involved in this appeal. The arbitrator has to make up his mind as to what is a fair sum to allow, and that may be arrived at by many different processes. The learned county court judge has laid down nothing as a matter of law, but has dealt with this case alone. It has never been held that the commutation must be upon an actuarial basis. The mode of computation prescribed by the Act of 1906 must of course be followed in cases arising under that Act, but there is no such rule under the Act of 1897.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from the decision of the learned county court judge raising a curious point. There was an admitted accident to the workman. Compensation in fact was paid to him at the rate of 16*s*. 1*d*. per week for a considerable time, and that ceased in the autumn of last year under circumstances which we know nothing about. That was followed by an application for an award, and on January 12 of this year an award was made for payment of compensation at the rate of 16*s*. 1*d*. per week from September 16, 1910. That is the date when, as I said, the other payment of 16*s*. 1*d*. had ceased. That is the award, and that is the only thing which has to be

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considered in this application which was made by the employers to redeem this weekly payment. That depends upon s. 13 of the First Schedule of the Act of 1897. That award having been given, the employers applied for a redemption of the weekly payment. The respondent submitted to an award for the payment of a lump sum in redemption. It came before the learned county court judge, who has informed us very clearly and very plainly of the procedure which he adopted. He said, according to counsel's notes which are before us, and the accuracy of which, of course, is not in any way questioned, that 300*l.* would be a reasonable sum for a jury to have awarded for compensation at the date of the accident. He then said: "Well, I take that as a starting point. I then subtract the number of payments of 16*s.* 1*d.* which he has received in fact since that date; I do the subtraction and I find the balance comes out at 120*l.* 13*s.* 5*d.*, and that is the sum which I award." Was that a legitimate procedure? In my opinion clearly it was not. All that the learned county court judge as arbitrator had to do was to assess the redemption for the weekly payment under the award of January last. To say that he did arrive at that by assessing what he thinks a jury would have given at the date of the accident and subtracting all the payments which had been made since that date would land you into most ridiculous and absurd results; for, as I pointed out to counsel when the appeal was being opened, supposing this man had lived three years longer, the result of this process would have been that not one penny could be awarded for the redemption of this sum, because the weekly payments since the accident would have swallowed up the entire 300*l.* I am most desirous not in any way to fetter the reasonable discretion of the county court judges in awarding lump sums. I think it would be disastrous if we did that. But I think it would be equally disastrous if we were to allow it to go abroad that county court judges, in arriving at the sum, could arbitrarily adopt a system which, if it had been adopted by a jury under the direction of the judge, would have been ground for setting aside the verdict of the jury. It seems to me that it is obvious, not only from the judge's note, but from the odd pounds, shillings, and pence in the award, that the mode in which he has

arrived at his award is absolutely fallacious and impossible to justify.

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I think, therefore, that this appeal must be allowed, and the case must go back to the learned county court judge on the ground that he has applied a wrong principle of law not justified by the Act. The appeal must be allowed with the usual consequences.

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FLETCHER MOULTON L.J. I am of the same opinion. The reasons have been so fully and so well stated by the Master of the Rolls that, if it were not that I think this is a very important case, I should not have delivered a separate judgment. In this case the sole duty of the county court judge was to find the present value of an award of 16s. 1d. per week made on January 12, 1911, in favour of this particular workman. Nothing that had happened before could by any possibility affect the commutation of that award, except so far as it might throw light on the future probabilities of the life of the man. The questions whether he had been receiving compensation before the date of the award, or again what he would have got at the date of the original award if he had chosen to commute it for a lump sum, are perfectly irrelevant, and they ought not to have been considered by the learned judge. He had nothing whatever to do with anything excepting the existing award and its commutation value.

That being so, it is clear that the method of commutation that he adopted was based on the use of inadmissible materials. Therefore his judgment cannot be supported. It may be useful to point out the reasons why that method is so fallacious. Just consider what would have been the problem before him if the application to commute had been made six months after the accident. He would have had to consider what were the probabilities of the life and of the capacity for work of the workman—*rebus sic stantibus*. One can imagine a case where it is doubtful whether the workman will survive. So long as this is the case one would naturally give a smaller lump sum, because one has to make a fair estimate of what the weekly award would actually work out at. One has, therefore, to consider the chance of life

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of the workman—the probability whether he will have a long or a short life. But now, five years later, this problem which would have puzzled the arbitrator, and must have been solved roughly by him at the earlier date, has to a great extent been solved by the lapse of time. There was a possibility that the workman might die during those five years; but that is now settled, because he has in fact survived. His chance of life may be actually greater than it was at the earlier date and if shorter it is almost certainly not so by as much as five years. Everybody knows that the expectation of life of a person of forty is not necessarily ten years shorter than the expectation of life of a person of thirty. On the other hand, the consequences of the accident, and the consequences of the incidents of his intermediate life, are visible in the physique of the workman, so that the materials for estimating what his future life is worth at the date of this award of January 12, 1911, are quite different from those which would have been at the disposal of the arbitrator in determining his then chance of life, if an earlier application had been made. Hence it is not by virtue of any technical rule of law that we say that this method is inadmissible; it is a wholly fallacious method from the nature of things. Therefore I am of opinion, with the Master of the Rolls, that the learned county court judge's award, being frankly and openly based on this wrong method, must be treated like the verdict of a jury where the judge has misdirected them with regard to damages, and the case must be sent back for reassessment of the compensation.

FARWELL L.J. I agree. I think it is plain that the learned county court judge has not a free hand under this section, but must proceed on principle. He has to ascertain the redemption value or in other words the purchase price of a fixed annual payment: the amount is the sum awarded; and then the judge has to find something by which to multiply it. He considers the probability of recovery, but it must be six months after the accident, so that the injury is apparently likely to be permanent; but it may not be. The judge must therefore consider the probability of the man's being able to work again, either wholly or partially. He must consider the man's age and his state of

health, so as to ascertain his expectation of life. What the employers have already paid appears to me to be absolutely irrelevant. The accident was in 1906. The award was in January, 1911. Supposing there had been redemption in 1906, there would have been five years more by which to multiply the amount of the award, having regard to the expectation of life; but now he has to consider the expectation of life as from January, 1911. I fail to see what the antecedent payments, or what would have been the sum for redemption five years ago, have got to do with it. In fact and in truth it must necessarily be a smaller sum than would have been given in 1906, because, as I say, there would be five years more life to allow from that time; and to deduct it again now appears to me to be deducting it twice over. I confess I do not follow the reasoning of the learned county court judge, and I think he has acted on a wrong principle.

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Appeal allowed.

Solicitors for appellant: *Crowders, Vizard, Oldham & Co.,
Agents for Hockin, Beckton & Hockin, Manchester.*

Solicitors for respondents: *Pritchard, Englefield & Co.,
Agents for H. Bostock, Hyde.*

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[IN THE COURT OF APPEAL.]

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Oct. 18.

MOORE v. NAVAL COLLIERY COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (1.) (a), (b); s. 8 (1.)—Industrial Disease—Certificate of Date at which Disablement took place—Certifying Surgeon—Time for giving Notice—Reasonable Cause for Failure.

A collier worked in the respondents' colliery up to September 3, 1910, when there was a strike. He had been suffering for some time from "nystagmus," a disease of the eyes which is an "industrial disease" under the Workmen's Compensation Act, 1906, but he earned full wages up to September 3. He was told by his doctor that the disease could usually be cured by spending a short time above ground and in the open air. The workman, thinking the strike would give him an opportunity for getting well, did not give notice of his illness. In February, 1911, he found that he was not getting better and saw his doctor again. The doctor sent him to a specialist, and he advised him to apply to the certifying surgeon for the district. On March 7 the surgeon gave him a certificate that he was disabled by "nystagmus" and the disablement commenced on September 3, 1910. On March 9 the workman made a claim for compensation :—

Held, that the failure to make a claim within six months was occasioned by "a reasonable cause" within the meaning of s. 2 (1.) (b) of the Act.

Semble. In the case of an industrial disease where the Act contemplates that the certificate which fixes the date of the disablement may go back a long time, certainly twelve months, a workman cannot be disabled from making an application after six months from that date, when the certificate may fix the date more than six months back.

THE applicant in this case worked in the respondents' colliery underground from 1904 till September 3, 1910, when a strike occurred, and he ceased to work. He had trouble with his eyes, beginning in 1899, and his doctor told him that he was suffering from "nystagmus," which is an "industrial disease" within the Workmen's Compensation Act, 1906, s. 8, and that the cure was to work for a time above ground and be as much in the open air as possible. He continued to work underground till September 3, 1910, earning full wages. He had got considerably worse and knew that he might be disabled at any time, but thinking that the strike would enable him to stay above ground and probably get well, he did not give any notice to the respondents. In February, 1911, he found that his eyesight was not getting

better and saw his doctor again. The doctor sent him to a specialist, who advised him to apply to the certifying surgeon for the district. He did so, and on March 7 the surgeon gave him a certificate that he was disabled by "nystagmus," and that the disablement commenced on September 3, 1910. On March 9 the applicant sent in to the respondents a claim for compensation.

The county court judge held that the applicant was not entitled to compensation because he had not made his application within six months of the accident.

The applicant appealed.

Sankey, K.C., and *J. G. Pease (Villiers Meager with them)*, for the appellant. The applicant could not know what date the certifying surgeon would fix for the commencement of the disablement and could not be guilty of any negligence in not applying within six months of a date he could not know. The county court judge thought himself bound by the decision in *Roles v. Pascall & Sons* (1) that a man's ignorance of the existence of the Act was not a reasonable cause for not applying in time. But it does not cover this case. It was quite reasonable for the man not to make an application while he thought he would get well.

C. A. Russell, K.C., and *A. Parsons*, for the respondents. The man could have gone to the certifying surgeon at any time. He knew on September 3 that he had the disease and was entitled to compensation, and he might have given notice at any time. The judge suggested that the man was under a mistake in thinking he could not apply for compensation until he had got a certificate. But the man never said so; the reason he gave was that he thought he would get better. He knew in February that he was not getting better and could have applied then.

[The sections on which the argument turned are fully set out in the judgment of the Master of the Rolls.]

COZENS-HARDY M.R. This is an appeal from the decision of a county court judge who held that the claimant was not entitled to compensation on the ground that he did not make his claim within six months of the date of the accident.

(1) [1911] 1 K. B. 982.

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It is a very peculiar case, the like of which, so far as I am aware, has never come before this Court. It is not a case of an accident as ordinarily understood. It is a case of an industrial disease which is made (an Act of Parliament can do anything I suppose) to be an accident for the purposes of the Workmen's Compensation Act. It is well to state shortly what the provisions of s. 8 of the Act are: "Where the certifying surgeon certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act"—they are what I call industrial diseases—"and is thereby disabled from earning full wages at the work at which he was employed; or (ii.) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease; or (iii.) the death of a workman is caused by any such disease; and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease, or such suspension as aforesaid, were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(a) The disablement or suspension shall be treated as the happening of the accident." By sub-s. 4 the certifying surgeon is to certify the date on which this disablement commenced, or, if he is unable to certify such date, the date on which the certificate is given. In the present case the certifying surgeon gave a certificate on March 7, which the man I suppose got on the 8th or the 9th, certifying that the disablement commenced on September 3, 1910. The particular disablement is this: "I am satisfied that he is suffering from nystagmus, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed." The certificate follows precisely the words of the Act, and is in the proper form.

The first thing that strikes one is that, on the face of that certificate, the accident happened more than six months prior to the date of the certificate, and the man therefore could

not have presented his application within the six months; and, although I do not think it is necessary in the present case to decide this appeal on that ground, as at present advised I am clearly of opinion that it is not possible to hold in the case of an industrial disease, where, as the Act contemplates, the certificate may go back a long time, certainly twelve months, that a workman is disabled from presenting after the expiration of six months an application in which the date of the accident has to be stated, when the certificate, which alone fixes the date of the accident, may fix it more than six months back. But in the present case I think there is another and amply sufficient ground for dealing with it. Although there is the provision with regard to the claim being made within six months, exception is made in s. 2, sub-s. 1 (b): "The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." Now, nystagmus is a disease to which colliers are subject. It is the disease which this man has had since 1899. He says "I have had trouble with my eyes: I asked Dr. Llewellyn, and he said it was nystagmus"; but nevertheless he has worked underground since October, 1904, and he has worked continuously up to September 3, 1910. He was not in fact up to that time disabled from working at his work as a collier, and earning full wages, but he was in that state in which he knew that he might become seriously disabled, and he also knew, as his doctor told him, that the most likely means of curing this disease was to be in the open air as much as he could and to work above ground, and that in cases where that course is taken the disability very generally disappears, and the man is completely restored.

On September 3 there was a strike, which unhappily proved a very lengthened strike. The man thought, and the learned judge did not for a moment question his good faith, that as he would not be underground, but would be above ground while the strike continued, there was every chance of this ailment disappearing, and he would be completely recovered when work was resumed. That went on. The

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colliery strike continued, and in February he saw his doctor and found that his sight, instead of getting better, was getting worse, and the doctor sent him to a specialist, Dr. Cresswell. I will read the passage in his evidence : " In February I found that when in twilight, or artificial light, my sight had not improved at all, and acting on Dr. Llewellyn's advice, I consulted Dr. Cresswell, and afterwards made application to the certifying surgeon on the 7th March." He went to him practically at once. We have not the precise date in February, but he went to the certifying surgeon practically at once, and the certifying surgeon gave his certificate, and within two days of the certificate this application was made.

Is that not a case in which there was, in the language of this section, reasonable cause for not presenting the application sooner? In my opinion it is. In the case of a man many years in the same employment, whose good faith is not impugned, who is told " A few days above ground and in the open air will probably make you all right," who does not immediately make a claim against his employers, who had been paying him full wages up to that time, but believes the change and open air will set him right, and when he finds it does not again consults his own doctor, and consults a specialist, and on their advice immediately—I say immediately because it was probably within a week—goes to the certifying surgeon and gets the certificate, and then immediately makes his application, I should be very sorry indeed to hold that that was not a reasonable cause for not having entered his application sooner.

In my opinion, the learned county court judge was wrong in the view which he took, and I have the satisfaction of knowing that by sending this case back to him to deal with I am doing what he desires should be done, and what he thinks ought to be done in justice to the man. I think this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion, and I should consider that there was a very grave blot in the Act if a case like this was outside its remedial action. The Act is primarily drawn up on the basis of dealing with accidents. In the latter sections it includes industrial diseases, and of course

there are provisions which make such alterations in detail as are requisite to make its machinery fit industrial diseases. But the main clauses were not primarily drawn up with special regard to diseases, and in such a case it is not uncommon to find that the adapting provisions are not in all respects adequate. Fortunately in the earlier provisions there is a section which enables the Court to relieve an applicant from the consequences of not strictly complying with the letter of the law in such matters as notice and claim, provided that there is reasonable cause shewn. One might almost have been certain that the case of industrial disease would, for the reason I have just given, afford many cases where the Court would have, from the very nature of the case, to avail itself of this power of relieving from such technical breaches of the Act on the ground of reasonable cause. No better example could be given than the present case. In applications for compensation for industrial diseases the date of the accident has to be fixed by a person other than the workman, namely the certifying surgeon, and is fixed by him *ex post facto* from knowledge not necessarily in the possession of the workman at all, and most probably not in his possession before the date of the certificate. In this case the man is working as usual although suffering from the disease. He goes on working until September 3, earning his full wages. His work then terminates, not because he is disabled, but because there is a strike. He knows that he has been suffering seriously, but still he has been able to continue working. He is told by his doctors that daylight is the proper remedy for this disease and he considers that the forced inactivity brought about by the strike will probably put his eyes right sufficiently to enable him to go on working. Nearly six months pass. He finds that the expected improvement has not taken place, and he goes to his doctor, and his doctor sends him to a specialist, who gives him advice of such a nature that he goes to the certifying surgeon. The certifying surgeon finds that his case, in the condition in which it then is, is such that in his opinion the man is disabled and he prepares to give the certificate. For that purpose he asks himself "When did this occur?" and knowing that for six months the man has been in daylight, and that, therefore, in all probability the disease has lessened rather than increased, he puts

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down that he considers that the man was disabled on September 3. That is a proper certificate under the circumstances. But it would be extremely unfair to say that because the expert on seeing the man in March can determine that he must have been so seriously ill on September 3 as to have been entitled to a certificate of an accident at that date, the workman is affected with the knowledge that he was entitled to call himself disabled on September 3. I have no doubt whatever that this man did not know that he was incapacitated on September 3, and that he did not know it until he got the certificate. There was, therefore, very reasonable cause for his not making the claim earlier than the date at which he went to the certifying surgeon, and there is no question of any delay after that date. I should feel the greatest regret if in a case of this kind, where a man has abstained from pleading his disease, and has clung to the hope that he will be able to continue his work because he has reason to believe that he is getting better, and that before he will have to go to work again he will be fit to do so, we were forced to hold that he has disabled himself from getting compensation now that it is found that the rest has proved insufficient to cure the disease.

For these reasons I agree with the judgment of the Master of the Rolls.

FARWELL L.J. I am of the same opinion. The only question for us is a question of law, whether the failure to make the claim within the period mentioned was occasioned by reasonable cause.

The facts which go to shew whether that cause is or is not reasonable are for the judge of first instance, and are not reviewable by us. Whether those facts constitute reasonable cause, or not, is a question of law for us; for example if a man says "I have married a wife and therefore I cannot come," the question of fact is whether he is married or not; but whether that is reasonable cause or not is a matter of law to be considered by the judge of first instance, and then in review by us. Here the learned county court judge having found the facts has treated the conclusion as a question of law, and I think he was right in so doing.

The next question is whether these facts, which have been detailed by my brethren, constituted reasonable cause. I think the real answer to it is this: the point we have to consider is not so much whether the claim was unreasonably delayed, as whether the visit to the certifying surgeon was unreasonably delayed. I say that because in my view it was impossible for the workman to make a claim in accordance with the requirements of the Act until he had ascertained in the only way possible the date of his accident. These being hypothetical accidents, created by statute, owe their existence to the Act, and it cannot be said that an industrial disease is an accident at all unless and until the certificate has fixed the date of it, or rather it cannot be said that it was an accident which happened on a given day until the certificate has fixed the date of it. Therefore until he got his certificate he could not comply with the requirements of Form 1 under the schedule to the Act. The disablement or suspension is treated as the happening of the accident, and the certifying surgeon has first to certify what that date is, and until he does so there is no means by which a proper claim can be put in because there is no accident the date of which can be given. That the want of a certificate is a complete answer is shewn by s. 8, sub-s. 1, where one of the statements is that "the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement." It is impossible for the man to put in a claim within six months if the certificate is that the accident happened ten months before or eleven months before and he does not know this date until the certificate is given. It follows, therefore, that it must be held to be reasonable that the man is not bound to, and in fact cannot put in fair claim at all, until the certificate has been given. Of course it does not follow that he is entitled to delay going to the certifying surgeon indefinitely. In this case I think he was quite reasonable in the way in which he acted. We have to bear in mind that this is a bona fide claim; there is no sort of doubt or suspicion cast upon it; a claim as to which, under another head, the county court judge has already held as a fact that the managers were not prejudiced in any way.

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To say that the workman, who, hoping he would recover during the continuance of the strike, intending to live in the open air and adopt the course recommended as a cure, refrained from going to the certifying surgeon with the view to putting in a claim, had not a reasonable cause within the Act for his failure to make a claim within the specified time, seems to me to be rather shocking.

I therefore agree the appeal should be allowed.

Appeal allowed.

Solicitors : *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

J. R. B.

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STEVENS v. INSOLES, LIMITED.

Oct. 25.

Employer and Workman — Compensation — Notice of Accident — Notice in Writing — Particulars written down by the Employers' Overman — Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2.

On February 16 a boy working with his father in the respondents' colliery was slightly injured in the hand and arm by the fall of a stone from the roof. The respondents had put up a notice in every level, "Any person receiving any personal injury in or about this mine shall before leaving the mine report the same to the manager, under-manager, or fireman." Within a few hours of the accident the overman of the level and a sub-manager of the mine came round, and the father, in the boy's presence, told them of the accident, and the overman then and there wrote down full particulars in a book with which the company had provided him for that purpose. The boy stayed at home till March 4 and then returned to work. Formal notice was given of the accident at the respondents' office on March 2 :—

Held, that the notice written down by the overman in the presence of the boy and his father was a good notice in writing within the Act.

THIS was an appeal from the award of the county court judge of Glamorganshire refusing compensation in respect of an accident to a boy in the employment of the respondents on the ground that notice of the accident had not been given to the

employers as soon as practicable after the accident and that the employers had been prejudiced.

The applicant was a boy of fifteen, who on February 16 was working as colliers' boy in the respondents' colliery with his father, when a stone fell from the roof, crushed his finger, and bruised his arm. The respondent company had put up a notice at the mouth of the level in the following form:—"Coal Mines Regulation Act, 1887. Special Rule 6. Any person receiving any personal injury in or about this mine shall before leaving the mine report the same to the manager, under-manager, or fireman." A similar notice was printed on the pay tickets. The accident happened about noon.

Between that time and 3 P.M., which was the end of the shift, Davies, who was overman of the level, and Mr. Yorarth, who was a sub-manager, came round. The applicant's father told them of the accident, and Davies, in the presence of the boy and his father, entered all the particulars in a diary supplied to him by the company for that purpose. Yorarth at the same time told the boy to go home for a few days and then come back to work.

The boy was away from work until March 4 and attended by his own doctor. A written notice of claim was given to the respondents at their office on March 2. The respondents gave evidence that the diary kept by Davies was never sent to the office, but kept at the pit, and only used as a check when formal notice was sent in. They considered that they were not entitled to send their doctor to examine a workman under s. 4 of the First Schedule to the Act until the workman had given formal notice in writing of the accident, and they never had sent their doctor until that notice had been given. They contended that they had been prejudiced by the delay in formal notice because their doctor had not examined the boy.

The county court judge treated the notice of March 2 as the first notice given under the Act, and held that that notice was not given as soon as practicable after the accident, and that the employers were prejudiced; therefore the applicant was not entitled to compensation.

The applicant appealed.

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Sankey, K.C., and Clive Lawrence, for the appellant. The notice given to Davies was sufficient, for by giving him the diary to keep the company had appointed him their agent to receive notice. The notice the company put up at the mouth of the level was a direction how notice of an accident was to be given, and it was complied with. Davies took down the notice in writing in the presence of the boy and his father. It was the same thing as if they had written it. It was a good notice in writing.

C. A. Russell, K.C., and G. M. Gathorne-Hardy (A. Parsons with them), for the respondents. This point was never taken in the Court below; the notice of March 2 was treated on both sides as the only notice.

Hughes v. Coed Talon Colliery Co. (1) decides that the notice must be in writing and that the burden of proof that the employer was not prejudiced is on the workman. Sect. 4 of the First Schedule to the Act gives power "where a workman has given notice of an accident" to require him to submit to medical examination. That must mean when he has served the formal notice required by s. 2. The notice given to Davies was certainly not served, and until it was the company had no power to send their doctor to examine the boy. They were clearly prejudiced, for when they got a proper notice the boy had recovered.

COZENS-HARDY M.R. This appeal raises rather a curious point. The boy was a boy working in the colliery and he worked under the colliery rules which are posted at the mouth of each level of the colliery: "Any person receiving any personal injury in or about this mine shall before leaving the mine report the same to the manager, under-manager, or fireman." The boy was working with his father and another man, and somewhere about 12 o'clock a stone fell. He with his father reported the accident to "the manager, under-manager, or fireman." They two, the father and the boy, saw Mr. Davies, the overman, and Mr. Yorarth, the under-manager. It is said Mr. Davies is not strictly the manager, he is the overman, but that does not really matter at all. "My father told them of the accident and they made an

(1) [1909] 1 K. B. 957.

entry in a book." It is admitted that verbal notice was given and entered in a book. The book is here. It contains every material particular of the accident; the date, the hour, the nature of the accident—all that is entered in a book which is made up by the company, ruled with lines for the very purpose of containing the date, the particulars, and so on, of the accident. The inference which I draw from that is that the entry was made in the company's own book by the manager and Mr. Yorarth or one of them in the presence of the father and the boy, and as their agents, and for the purpose of giving them notice. Then it is said "Oh, but it is not served." To talk of serving a notice in writing when I give it, when I write it in the book of the company, is a refinement to which certainly I am not prepared to assent. If these particulars had been written by the father or by the boy in his own handwriting in this book, the case would not have been arguable. It would not make any difference if instead of being written by the father or by the boy himself it was written in their presence by the manager to whom they gave the particulars, and it in fact was a mere record of the particulars which they gave. I therefore think there was written notice amply to satisfy the requirements of the Act.

Even if that were not so on the evidence here, I think the learned county court judge was wrong in saying there was no evidence that the masters had not been prejudiced. It seems to me impossible to say there was any prejudice here when every particular was known to the officials of the company within less than an hour or contemporaneously. They knew everything about it. They had every particular which was wanted, and the suggestion that because a written notice was not sent to the officials of the company up above, but only recorded in the books below, the company could not send their doctor to report, is a suggestion to which I desire to give no countenance.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree. There is one other point in the evidence which rather impresses me, and that is that, after Davies had interviewed the boy and written down the note of

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C. A. the accident, Yorarth told the boy to stay at home for a few
1911 days and then come back to work. That seems to me a clear
recognition of the accident which disabled the boy.

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Appeal allowed.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

J. R. B.

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[IN THE COURT OF APPEAL.]

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AMYS v. BARTON.

Oct. 25.

Employer and Workman—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 1, 13—Accident "arising out of" Employment—Sting of Wasp—Special Risk—Evidence—Statement of Deceased Workman—Admissibility.

Upon a claim for compensation under the Workmen's Compensation Act, 1906, it appeared that on October 18 a workman employed by a farmer as engine-driver was driving the engine of his master's threshing machine while threshing wheat in a field. It was suggested that while so employed he was stung in the leg by a wasp. There was evidence that his fellow workmen had seen a few wasps close to the engine and that there were none about elsewhere. The workman did not complain of being stung at the time. On the next and the following days he complained of being drowsy and having pain in his leg, and that he was unfit for work, but he continued to work until the 27th, when he came home very ill. The doctor saw him on the 28th and 29th and found him suffering from blood poisoning. On the latter day the workman made a statement to the doctor, in the presence of his wife, that his bad leg was caused by the sting of a wasp on the 18th. He died on November 1. His widow claimed compensation:—

Held by the Court of Appeal, reversing the decision of the county court judge, that, assuming that there was sufficient evidence that the accident occurred in the course of the workman's employment, there was no evidence that his employment exposed him to any such special risk as would enable the Court to hold that it arose out of his employment, and that the claim could not therefore be supported.

Held, also, that the statement of the deceased workman of the cause of his illness was not admissible.

Wright v. Kerrigan [1911] 2 I. R. 301, explained.

THE applicant in this case was the widow of Charles Amys, who had worked for the respondent Barton, a farmer, as blacksmith

and engine-driver. On Tuesday, October 18, 1910, he was driving the engine of a threshing machine in a field for threshing his master's wheat. It was alleged that he was then stung by a wasp. He made no complaint on that day. The next day he complained to his wife of feeling tired and sleepy and of pain in his leg. He went to work for the rest of that week. On the Sunday he kept complaining that his leg was painful. On Monday he complained again of pain in his leg, and said he did not feel like going back to work, but he did go back and worked until the Thursday. When he came back from work on that day he was very ill. His wife got him to bed, and the doctor saw him on Friday and Saturday. The doctor found him suffering from blood poisoning, but could find no wound or abrasion. On Saturday Amys told the doctor, in the presence of his wife, that he had been stung by a wasp on the 18th. He died on November 1. The doctor gave evidence that the symptoms were such as would be caused by a poisonous wasp sting and could only be accounted for by poison from some insect.

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Two workmen who had worked with Amys at the threshing gave evidence that they had seen some wasps about near the engine which Amys was driving, and that there were no wasps about anywhere else; but Amys had not told them he had been stung. Another witness, Clarke, saw him limping home a week before his death, and Amys then told him he had been stung by a wasp some days before.

The county court judge held that the accident "arose out of" the applicant's employment. He had admitted the doctor's evidence of Amys' statement that he had been stung by a wasp.

Gerald Dodson, for the appellant. There was no evidence before the county court judge that the man was stung while at work at all, except the doctor's evidence of the statement made to him. A statement by the workman as to the cause of his illness is inadmissible: *Gilbey v. Great Western Ry. Co.* (1) The judge appears to have relied upon *Wright v. Kerrigan* (2), but when that case is examined the head-note is not borne out by the

(1) (1910) 102 L. T. 202; 3 Butt.
 W. C. C. 135.

(2) [1911] 2 I. R. 301.

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judgments ; the judges decided the case on the ground of necessary inference, following *Mitchell v. Glamorgan Coal Co.* (1) If the statement of the workman is ruled out, there is nothing whatever in this case on which any such inference can be based. The judge cited *Warneken v. R. Moreland & Son* (2), but that relates to quite a different question.

But assuming there is evidence that he was stung during his employment, there is no evidence that the accident arose out of his employment. It is not shewn that his employment exposed him to any risk not common to all mankind according to the tests laid down by Lord Loreburn L.C. in *Kitchenham v. Owners of S.S. Johannesburg* (3), and by this Court in *Craske v. Wigan* (4) and *Warner v. Couchman*. (5)

A. W. F. Bagge, for the respondent. In *Owners of S.S. Swansea Vale v. Wright* (6) and *R. Evans & Co. v. Astley* (7) Lord Loreburn L.C. said that it is impossible to measure the facts of one case by the facts of other cases or to lay down a scale or standard of the amount of proof necessary to enable the judge to draw an inference. In this case the complaint to Clarke was admissible, and quite apart from the doctor's evidence there was quite enough to enable the judge to draw the inference that the man was stung while at work. In *Gilbey v. Great Western Ry. Co.* (8) the Court held that there was no evidence except the workman's statement. The accident here arose out of the man's employment because his employment kept him where the danger was. There were no wasps about elsewhere. In both *Craske v. Wigan* (4) and *Warner v. Couchman* (5) the county court judge had found as a fact that there was no risk beyond what was incurred by the general public. Here the finding is the other way.

COZENS-HARDY M.R. This case has been very well argued, but, having listened attentively to the arguments, I have come to the conclusion that the decision of the learned county court

(1) (1907) 23 Times L. R. 588.

(2) [1909] 1 K. B. 184.

(3) [1911] A. C. 417

(4) [1909] 2 K. B. 635.

(5) [1911] 1 K. B. 351.

(6) (1911) 4 Butt. W. C. C. 298,
300.

(7) (1911) 4 Butt. W. C. C. 319, 321.

(8) 102 L. T. 202 ; 3 Butt.
W. C. C. 135.

judge cannot be supported, because there is no evidence that the accident arose out of the employment.

I assume for the purpose of my decision that there was sufficient evidence to shew that the deceased man was on October 18 stung by a wasp when he was engaged in working for Barton, the present appellant, and that the sting of that wasp introduced into his system the poison which ultimately led to his death on November 1; but that is only part of the necessary proof. It must never be forgotten that the accident must not only arise in the course of the employment, but must also arise out of the employment. If I may venture to repeat what I said in *Craske v. Wigan* (1), "it is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that kind is established the applicant must fail, because the accident is not one arising out of and in the course of the employment."

In this case the man was an engine-driver. He was employed by the year. On this particular occasion he was threshing his master's wheat: he was engaged in a field, the engine being there and the wheat being threshed: there were a few wasps there, no great number according to the evidence, but there were some, probably what are known as drowsy or sleepy wasps. One of those I assume stung his foot just above the ankle, and that caused, ultimately, his death. But what is there to connect that accident with his employment? What peculiar risk was he exposed to? The learned county court judge, without any evidence, seems to have arrived at the conclusion that the wasps were beginning to hibernate in the stack, that the noise or heat of the engine woke them, or induced them to come out, and that they were irritated and stung him. There is not a particle of evidence to justify that finding, and it seems to me that the occupation of this man, so far as the sting of a wasp was concerned, did not expose him to any peculiar risk, or any greater

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(1) [1909] 2 K. B. 635, 638.

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exposed to.

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On that short ground, following, I think, the view of this Court in *Craske v. Wigan* (1), and also in *Warner v. Couchman* (2), I think that it is impossible to say that there was here any risk peculiarly incident to the employment which justified the learned county court judge in his finding that the accident arose out of the employment. On that ground the case must be disposed of in favour of the appellant.

But as mention has been made, most properly, of a case in the Irish Court of Appeal, I think it right just to say one word about it. The learned county court judge admitted a statement made to the doctor ten days after the accident. "Amys told me he was threshing wheat and must have disturbed a wasps' nest, as wasps were about, and one stung him, and that he sat down and unlaced his buskin, and took a dead wasp off his stocking."

The view of this Court as to the admissibility of a statement of that kind has been expressed in a form which is binding upon us in the case of *Gilbey v. Great Western Ry. Co.* (3), where we said that statements made by a deceased man as to his bodily or mental feelings are admissible, but that those made as to the causes are not admissible in evidence. The learned county court judge seems to have thought that the very recent case in the Irish Courts of *Wright v. Kerrigan* (4) was inconsistent with that view, and he held that this evidence was admissible. The marginal note, undoubtedly, bears out the view which his Honour took of the case. That was a case where "a workman in the employment of an undertaker and funeral contractor had, in the course of his ordinary duty, to lift coffins in and out of vans. One morning he went out to his work without any marks of physical injury, and he returned suffering from hurts to his chest, side, and leg, the marks of which were visible and seen by his wife and medical attendant. They were caused by abrasions as if something had knocked against him. He told the doctor they were the result of an accident, and the doctor stated to the

(1) [1909] 2 K. B. 635.

(2) [1911] 1 K. B. 351.

(3) 102 L. T. 202; 3 Butt. W. C. C. 135.

(4) [1911] 2 I. R. 301.

employer that the injured man said that he met with an accident by the moving of a coffin, that he was bad, and would probably die of his injuries." The marginal note is—"Held by the Court of Appeal, that the statements of the deceased workman were properly admitted in evidence." The judgments do not bear out that head-note at all. Neither the Lord Chancellor nor Holmes L.J. says a word to that effect. They both base their judgments upon the ground that the circumstances were such as to justify the inference that the accident happened while the man was at work within the principle of *Mitchell v. Glamorgan Coal Co.* (1), which we have had so often before us. There is nothing in the judgment of Cherry L.J. to justify that marginal note, except one passage in which he says this: "The recorder admitted statements by the deceased man to his medical attendant, Dr. Crinion, as to his symptoms and their cause. Such statements are usually held to be admissible upon the ground that there are no other means possible of proving bodily or mental feelings than by statements of the person who experiences them."

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With great respect to the learned Lord Justice, I think that, although the second sentence is perfectly right, the reference, probably by accident, to "and their cause" cannot be supported. The decision in that case by all the members of the Court was based upon *Mitchell v. Glamorgan Coal Co.* (1), and it does not in any way justify the inference which the learned judge thought it would bear, namely, that it was inconsistent with our decision in *Gilbey v. Great Western Ry Co.* (2)

For these reasons I think that the appeal should be allowed with the usual consequences.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree.

Appeal allowed.

Solicitors: *Watson, Sons & Room, for Barton & Sons, East Dereham; Morris & Bristow, for C. H. Large, Swaffham.*

(1) 23 Times L. R. 588.

(2) 102 L. T. 202; 3 Butt. W. C. C. 135.

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Oct. 13.

[IN THE COURT OF APPEAL.]

NODEN *v.* GALLOWAYS, LIMITED.

Employer and Workman—Compensation—Injury by Accident—Cesser of Incapacity—Subsequent fresh Injury—Contributing Cause to further Incapacity—Claim for Compensation in respect of original Accident—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 1.

In 1902 a workman employed by the appellants was injured by an accident which resulted in the loss of the index finger of his right hand. He was totally incapacitated for work for six months, during which period he received compensation. He was then given lighter work by the appellants at his original wages. In 1910, while still in the same employment, he met with a further injury to his hand, which according to medical evidence was not the result of the original accident. Being again totally incapacitated for work, he claimed compensation under the Workmen's Compensation Act, 1897, in respect of the accident of 1902. The county court judge held that the accident of 1902 was a contributing cause of the incapacity and awarded compensation:—

Held, on appeal, that the county court judge had taken a wrong view of the law, and that the workman was not entitled to compensation in respect of the original accident.

Observations of Lord Loreburn L.C. in *Clover, Clayton & Co. v. Hughes* [1910] A. C. 242, distinguished.

APPEAL from an award of the deputy judge of the Manchester County Court upon an arbitration under the Workmen's Compensation Act, 1897.

The applicant was a boilermaker in the employment of the appellants. In October, 1902, the applicant was engaged in riveting a boiler when he received a blow on the first finger of his right hand with a heavy hammer, causing a compound fracture and necessitating the subsequent amputation of the finger. On October 29 the applicant gave notice of injury under the Act and compensation was paid to him at the rate of 17s. 9d. a week. The applicant was totally incapacitated for work until April, 1903, when his employers took him back and gave him light work as a caulker at the same wages he had been earning before the accident. He continued this work until September, 1910, when he was instructed by the foreman of the works to use a pneumatic caulking machine instead of the light

hammer which he had been using as a caulker. This machine was a heavy instrument worked by compressed air, and acted as a hammer, giving a succession of very rapid blows causing much vibration. After using this for a short time the applicant's hand became very painful and inflamed, not in the region of the stump formed by the amputation, but lower down the hand between the stump and the thumb. A radiograph of the hand was put in from which it appeared that in the middle of the metacarpal bone of the index finger there was a piece of diseased bone, and according to the medical evidence this condition was not the result of the original accident in 1902, but of some second injury, as to which there was no evidence when it occurred, the inflammation and pain being set up by the vibration of the caulking machine. The applicant, being again totally incapacitated, claimed compensation under the Workmen's Compensation Act, 1897, in respect of the original accident in 1902.

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The deputy county court judge held that the accident of 1902 was one of the contributing causes of the incapacity. It was the use of the caulking instrument which had brought on the injurious effects which were really in the first instance due to the injury received in 1902. On those grounds he awarded to the applicant compensation at the rate of 17s. 9d. per week, being half his wages.

The employers appealed.

C. A. Russell, K.C., and *E. W. Wingate Saul*, for the appellants. The deputy county court judge misdirected himself as to the meaning of "incapacity resulting from the injury." The claim was not in respect of the accident of 1910, but of the accident in 1902. The judge held that the accident of 1902 was one of the contributing causes of the incapacity and awarded compensation on that ground. He based his finding upon the following passage in Lord Loreburn's judgment in *Clover, Clayton & Co. v. Hughes* (1): "It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened, and if the accident is one of the contributing

(1) [1910] A. C. 242, at p. 245.

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causes without which the injury which actually followed would not have followed." The question there was accident or no accident, and the observations of Lord Loreburn are not applicable to the present case. The medical evidence shews that what happened in 1910 was not the result of the admitted accident in 1902, although it may be said that if the first injury had not taken place what happened in 1910 would not have had the same result.

[COZENS-HARDY M.R. Suppose at the time of the second injury the man had been in the employment of a different master?]

It would have been no answer to a claim against the second employer to say that there would have been no second accident but for the first.

Adshead Elliott, for the respondent. There was in this case no second accident, but what happened in 1910 was the direct result of the injury suffered in 1902. Lord Loreburn in the case which has been referred to distinctly says that it is enough "if the accident is one of the contributing causes without which the injury which actually followed would not have followed." That entirely applies here.

No reply was called for.

COZENS-HARDY M.R. This appeal raises a question of undoubted importance and interest. The learned deputy county court judge was dealing with the case of a man who was a riveter in 1902, who met with an undoubted accident in 1902, which involved the amputation of the first finger, the index finger, of his right hand. He was out of work for some months, but the amputation was perfectly successful in this sense, that the stump was well healed, so much so, that although he did not resume his work as a riveter, involving the use of very heavy hammers, he was taken on by his old employers in, I think, 1903 as caulker, that employment requiring the use of a much lighter hammer. He did his work for his employers, Galloways, receiving his old wages from 1903 up to 1910. For seven years he was not feeling any effect as the result of the accident. By "any effect" I mean in the shape of disability to carry on his

work as a caulker, which was the new occupation he undertook in 1903. Now, in 1910, a new foreman came, who suggested that, instead of using the lighter kind of hammer which caulkers use, he should use a pneumatic instrument which, as we have been told here, vibrates very rapidly, and which is largely used for caulking purposes. He found, after a day or two, that it made his hand inflamed, and, beyond all doubt, his hand was inflamed, and he was not able to use this pneumatic instrument, and he then presented this claim under the old Act, and claimed compensation in respect of the admitted injury—the admitted accident—which took place in 1902. The learned deputy county court judge has directed himself, as a question of law, in these words: “The accident is laid as arising in 1902. The question is whether that accident is a contributing cause to the incapacity which has come on at different times.” Now the learned deputy county court judge lays that down as the proposition of law with which he has to deal. It seems to me to be a proposition most dangerous, and, I think, inaccurate. Suppose there had been not the same employer in 1910 as there was in 1902, and suppose there was an admitted accident occurring in 1910 in circumstances which rendered that accident much more probable because the new employer of 1910 knew that the man was, to some extent, disabled by the accident of 1902, can it reasonably be suggested that the workman would have been entitled to say that the 1902 accident was contributory to the incapacity resulting from the 1910 accident, and that he could proceed against the 1902 employer and leave the 1910 employer untouched? Or could he proceed against both? In my opinion, when once it is shewn that the man having the disability occasioned by the 1902 accident met with another accident in 1910, it is the second employer who is liable and who alone is liable, and it is not relevant to say that the 1902 accident was a contributing cause. The proposition for which Mr. Adshead Elliott has contended is sought to be supported by some observations of Lord Loreburn in the case of *Clover, Clayton & Co. v. Hughes*. (1) Now it is always important to see what the real point was. The real point there was that a man brought with him into his employment

(1) [1910] A. C. 242.

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a physical disability ; he had an injury which I think was not known to the employers,—however, that did not matter,—he brought with him a physical disability, and he did some work and met with an accident, I think a fatal accident, as far as I remember, by reason of a strain, which strain would not have been serious, or caused any damage probably to a healthy man, but which, to this man, bringing his disability with him, proved fatal ; and what Lord Loreburn was considering was, I think, from first to last, Was that an accident ? He says : “ It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have followed.” He was only dealing with the question, accident or no accident—he was not in the least considering the question whether it was enough to say that subsequent incapacity is necessarily to be regarded as due to an antecedent accident, or whether it may not be due to some other cause. Taking the circumstances altogether, the injury was met with under circumstances which do not in themselves involve an accident.

I therefore think that the view taken by the learned deputy county court judge on the law of the case is wrong, and that he misdirected himself. But in the present case I think there was no evidence to justify the finding of the learned deputy county court judge. For seven years this man had been working with this perfectly healed stump, and we know from the radiograph which we have seen that, not on the stump itself, but some way down, there is what is shewn as a black spot. The doctor says that this was a diseased, or, probably, a dead, piece of bone, and he says distinctly that that is not due to the 1902 accident. It is that, apparently, which has caused the inflammation brought on by the use of this new machine, but there is nothing whatever enabling the learned deputy county court judge to fix the occasion upon which, or the incident by which, this dead or diseased piece of bone is to be found where it is said to be found. It was that piece of bone which was the real trouble, producing the inflammation and causing the disability to work, and I can

find nothing whatever on the evidence of the doctors to justify the contention of Mr. Adshead Elliott that that was in any sense due to the accident of 1902: it was probably due to some second cause, possibly to something which had supervened in the course of the seven years during which this man has been doing his work as a caulker.

In my opinion, both on the facts as well as on the law, this award cannot be supported, and the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The learned deputy county court judge has directed himself that it is quite sufficient if the original accident of 1902 was a contributing cause to the incapacity that now exists. That, I think, is incorrect in law. Let me take an example. A man meets with a small accident to one eye which leaves that eye more or less abnormally sensitive. Years after, he receives another injury to the eye which causes disease, and perhaps loses the eye, or loses the greater part of the utility of the eye—the sight becomes bad. A doctor might say that the results of the second accident are probably greater by reason of the general tenderness of the eye due to the first accident. But if there is no doubt that there has been a second accident and the injury is directly brought on by that second accident, the employers at the time of the second accident are, in my opinion, liable. That follows from this consideration. The House of Lords has laid down that if the employee is a man who has a defect, such for instance as a weakness in an artery, that defect is no defence against a claim for compensation for an accident which takes place in your service and produces an incapacity. I do not mean to say that, prior to the accident, the man may not have been in a position to obtain an award against his first employers for the injury which made his eye tender,—he might have shewn that it lessened his chance of employment and it might have been the ground for an award against them,—but when you are taking the incapacity which follows when a second cause has intervened, it is, in my opinion, the employers at the time of the intervention of that second cause who are liable for the whole incapacity. Their liability is not less because the man has

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brought to his work something which makes an accident more serious than it otherwise would be.

I have taken a clear case of two contributing causes, and if the law as laid down to himself by the learned deputy county court judge is right, the workman in such a case could go against the first employer or the second employer, and, for aught I see, against both employers. That is not the law. When a second cause intervenes and produces the incapacity and that second cause is in the nature of an accident, it is the second employer who is liable.

It must not be thought that I hold that if the incapacity develops without the intervention of a second cause of the nature of an accident it at all follows that it cannot be attributed to the original accident. In such a case the incapacity might be, and probably is, the sequence to the original accident. But the law as laid down by the learned deputy county court judge has relieved him from the duty of considering whether a second cause has intervened—he evidently thought that this was immaterial.

I also agree with the Master of the Rolls in thinking that, on the facts, there is no evidence to shew that the first accident was a cause at all of the incapacity from which the man is suffering. Now the facts are simply as follows: There was an amputation of a crushed finger, and the medical evidence shews that the metacarpal bone (which of course is between the finger and the rest of the hand) was uninjured; the doctor says certainly the condition that he sees there now could not have been the result of the amputation. Using one's common sense, I cannot see any ground for thinking that the metacarpal bone was otherwise than perfectly sound from 1902 onwards. Then the next thing is that, in 1910, great pain is developed when the man is using the pneumatic hammer, and it is discovered that there is a diseased spot in the bone a long way from the end where the amputation had taken place. Now what caused that, or what caused a state of things which made it possible for that to come on, is a matter as to which there is no evidence. An applicant has to prove his case, and I see no reason for thinking that the diseased spot on the bone is due to the use of the pneumatic hammer, though its

consequences may have been rendered more evident when the man tried to use that tool. No doctor will say that it could: he simply says, "He tells me the pain came on when he used it, therefore I supposed it was caused by that tool, and I conclude there must have been a second injury." I can see no evidence whatever that the second injury resulted from the mere using of the tool.

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For these reasons I think, in fact as well as in law, the judgment of the learned deputy county court judge was wrong. In saying it was wrong in fact, I mean there is no evidence that could justify his finding.

FARWELL L.J. I agree. I have nothing to add.

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co., for John Taylor, Manchester; Wheatly & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

G. A. S.

[IN THE COURT OF APPEAL.]

In re A DEBTOR (No. 1838 of 1911).

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Bankruptcy—Act of Bankruptcy—Non-compliance with Bankruptcy Notice—Validity of Notice—Notice to pay Judgment Debt—Place for Payment outside the Realm—Not in accordance with Terms of Judgment—Setting aside—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g).

Where a French firm had obtained a final judgment against the debtor, who resided in England, and had served upon him a bankruptcy notice requiring him to pay the amount due on the judgment to the creditors or one or either of them carrying on business at the address of the firm in Paris:—

Held, that the notice was bad, for it required the debtor to pay the judgment debt without the jurisdiction of the Court and was therefore not "in accordance with the terms of the judgment" under s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883.

In re a Debtor [1911] 2 K. B. 718, considered and explained.

APPEAL from a decision of one of the registrars in bankruptcy refusing to set aside a bankruptcy notice.

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On May 22, 1911, a French firm, Messrs. M. L. Candraye, G. Racine et Cie., carrying on business at 7, Rue Lafitte, Paris, obtained a final judgment against the debtor for 202*l.* 9*s.* 7*d.* and 10*l.* 15*s.* costs in respect of two bills of exchange accepted by him and dishonoured upon presentation. The judgment not having been satisfied, on July 3, 1911, the creditors issued and served upon the debtor a bankruptcy notice requiring him to pay the amount due on the judgment within seven days to the partners of the firm or one or either of them at the address of the firm in Paris. The debtor moved to set aside the notice on the ground that the place for payment was outside the jurisdiction of the Court. The registrar dismissed the application, and the debtor now appealed from his order.

E. Clayton, K.C., and *W. S. Schwabe*, for the debtor. The bankruptcy notice is irregular and ought to be set aside. It requires the debtor to pay the creditors at a place which is out of the jurisdiction. It is therefore not "in accordance with the terms of the judgment" within the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g). It imposes on the debtor a greater burden than is placed upon him by the judgment. The debtor is not bound to seek out his creditor if he is not within the realm: *Co. Litt.*, s. 340, p. 210a; *Sheppard's Touchstone*, cap. 6, p. 136; *Thorn v. City Rice Mills* (1); *Leake on Contracts*, 5th ed., p. 606. Either this is a notice to pay the debt out of the jurisdiction which the debtor is not bound to comply with, or there is no address for payment at all, in which case the notice is bad. [They also referred to *In re Stogdon*. (2)]

E. W. Hansell, for the creditors. The debtor is only required by the notice to do that which he has constantly done in the course of the business which has been transacted between the parties. There is no hardship upon the debtor, because payment abroad can now be easily effected through a bank.

The old rule at common law must be considered with reference to the development of modern business transactions. The propositions relied upon in the old authorities were laid down with reference to the dealings of English subjects inter se. The

(1) (1889) 40 Ch. D. 357.

(2) [1895] 2 Q. B. 534.

case of an English subject transacting business with a foreign creditor was not present to the minds of the writers.

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The bankruptcy notice is not bad unless it departs substantially from the terms of the judgment. The form of notice in this case was adopted in consequence of the decision in *In re a Debtor* (1), in which it was held that it was not in accordance with the terms of the judgment to call upon the debtor by bankruptcy notice to pay to any agent at all.

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According to that decision, although payment to an agent may be good, yet a bankruptcy notice requiring such a payment is a bad notice. The effect of that decision is that a creditor cannot require payment to his agent, and that has placed foreign creditors in a difficulty. Supposing it is sufficient to give notice to pay at an address in England, and there is an accredited agent there to receive payment, the debtor would not be entitled to have the notice set aside: *In re Persse*. (2)

COZENS-HARDY M.R. The plaintiffs in this action, the respondents here, are a French firm carrying on business in Paris. They had business relations with the debtor, and it is said, I have no doubt correctly, that these business relations had resulted in payment to the French firm by the debtor, by cheques or sometimes by acceptances which were duly met at maturity. In my view that has very little relevance in the present case, for the French firm did what they were entitled to do; they issued a writ in the King's Bench Division against their debtor in England, and upon May 22 this judgment was obtained: "The defendant having appeared to the writ of summons herein and the plaintiff having . . . obtained leave to sign judgment under . . . Order xiv., rule 1, for the amount endorsed on the writ with interest if any and 10*l.* 15*s.* costs: It is this day adjudged that the plaintiffs recover against the defendant 202*l.* 9*s.* 7*d.* and 10*l.* 15*s.* costs." Now what was the obligation imposed upon the debtor by that judgment? Was it an obligation to go to Paris and pay the creditors, or was it an obligation merely to pay them if they were within the realm? In my opinion the latter is the true view.

(1) [1911] 2 K. B. 718.

(2) (1911) 55 Sol. J. 314.

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We have had our attention called to very old authorities, Coke upon Littleton, Sheppard's Touchstone, and more recent and modern cases in which that rule has been undoubtedly affirmed and reiterated, and I see no reason whatever for the contention or suggestion that it has no application in the present case. This is not a case in which the rights under an implied contract between a firm in Paris and a firm in London have to be considered. We might then very likely hold that in an action on an implied contract between those parties there might be an obligation to pay in Paris by the custom which according to evidence had existed between the parties for a considerable course of time. But we have here, not a mercantile business transaction between a firm in Paris and a debtor in London, but a formal judgment of the High Court, a judgment which I think must have for this purpose just the same operation and effect as it would have had in the days of Lord Coke.

I see, therefore, no reason to doubt that under the obligations of this judgment the debtor was not bound to go to Paris. The creditors must come within the realm, and if they are within the realm, then no doubt the debtor must search them out.

That being the state of things, a bankruptcy notice was given in the following form:—"Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to Marie Louise Candraye (spinster) and Georges Racine (carrying on business as M. L. Candraye, Racine et Cie.), of 7, Rue Lafitte, Paris, in the Republic of France, or to one or either of them the sum of 213*l.* 4*s.* 7*d.* claimed by them as being the amount due on a final judgment obtained by them against you in the King's Bench Division of the High Court of Justice, dated 22nd May, 1911, whereupon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction, or the satisfaction of the Court; or you must satisfy the Court that you have a counter-claim, set-off or cross demand against Marie Louise Candraye (spinster) and Georges Racine which equals or exceeds the sum claimed by them." Now the bankruptcy notice is authorized by s. 4, sub-s. 1 (g), which says that a debtor commits an act of bankruptcy

"if a creditor has obtained a final judgment against him, for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after the service of the notice, in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." Now can it be said that this bankruptcy notice required payment of the debt "in accordance with the terms of the judgment"? In my opinion it cannot. It interposes a place of payment which is not, according to the common law of this country, a place in which payment could be properly required, namely, Paris, a place which is out of the jurisdiction. I think, therefore, that on that short ground this bankruptcy notice was wrong and cannot be supported, because it does not require the judgment debtor to pay the judgment debt in accordance with the terms of the judgment. The creditors have no right to impose an additional term not, according to the common law of this country, consistent with the judgment which has been pronounced. So much for the facts of this case.

But a much larger and more important question has been argued before us, namely, as to what is the position of a foreign creditor who has obtained judgment in this country with reference to bankruptcy notices—what can he do, and what can he not do? It seems to have been thought that a recent decision of this Court, to which I was a party, *In re a Debtor* (1), has created a serious difficulty, and that, in short, there are no means by which a foreign creditor can serve a good bankruptcy notice upon his English debtor. Now I think that case has been entirely misunderstood. There the notice given

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was in these words: "You must pay to Kitchin Aylard & Craddock late of 5 Copthall Court in the city of London, stock-jobbers, George William Kitchin and Martin Aylard two of the members of the late firm of Kitchin Aylard & Craddock now carrying on business in co-partnership at 4 Copthall Chambers in the said City and Leopold Radcliffe Craddock one of the members of the said late firm carrying on business under the style of J. B. Kennedy & Co., at Pinner's Hall in the said City or to their solicitors, Spyer & Sons of 65 London Wall in the said City, the sum of 611*l.* 13*s.* 1*d.* claimed by them as being the balance due on a final judgment obtained by them against you in the King's Bench Division of this Court dated the 26th August, 1910, whereon execution has not been stayed; or you must secure or compound for the said sum to their satisfaction or to the satisfaction of the Court." Then on the back of the notice was this: "Spyer & Sons of 65 London Wall in the city of London, solicitors suing out this notice certify that they have full authority to receive payment of the balance of the above mentioned judgment and to act for the said Kitchin Aylard & Craddock in respect of all matters specified in the above notice." On March 8, 1911, Kitchin, Aylard & Craddock presented a petition in bankruptcy against the debtor, the act of bankruptcy alleged being the failure to comply with this bankruptcy notice. The debtor opposed the petition on the grounds (1.) that the bankruptcy notice was not in accordance with the judgment and (2.) that it was embarrassing. Now the decision there was simply this. The solicitors had no implied authority of course to receive money for their clients, and the fact that the solicitors made a demand under the notice, "I tell you I have a power of attorney, please pay me," was not in our view a compliance with the Act. The judgment required payment to the plaintiffs, and it was not in compliance with the Act for the notice to require payment to the plaintiffs, or their solicitors, who certified, without any other proof, that they had authority to receive it. But so far from deciding that a notice to pay the plaintiffs in the action following the form of the judgment would not be sufficient if payment was directed to be at a particular address where there was an authorized agent to receive it, I think the contrary was in terms asserted.

I say, on p. 723, "Payment to any member of the firm would be a good discharge, it being a firm debt." But why would it be a good discharge? Simply because according to the general law, now statutory law, under the Partnership Act, each partner is an agent for the firm, and therefore by ordering payment to the firm at a particular address, one member of the firm being there, he is competent to receive the money and to give a discharge as agent for, and so to bind, the firm. Not only is that so, but the very point raised here was decided by this Court in March of this year in the case of *In re Persse*. (1) In *In re Persse* (1) the petitioning creditor was a house master at Winchester. Persse owed him some money. Judgment was obtained. The house master had two addresses, his house at Winchester, and a cottage where he was to be found in the vacation. He only gave the Winchester address in the notice. He was not at the Winchester address during the seven days, but it was proved that he had his butler there, who had authority during that time to receive the amount payable by the defendant, the judgment debtor, to him, and the Court of Appeal there held that that was a good compliance with the statute. It really seems to me it would not be open to us, having regard to the decision in *In re Persse* (1), to accept the proposition which has been strenuously argued before us by the respondents to this case, that payment to an agent is not payment to the principal within the meaning of this section.

I think, therefore, no difficulty whatever need arise in the case of foreign creditors. They have only to say, in the words of the bankruptcy notice, "Pay me the proper amount at some address in London," and to have at that address a duly constituted and proper agent duly authorized to receive payment on behalf of the plaintiff. I only mention that because it is quite obvious that the recent decision in *In re a Debtor* (2) has been misunderstood. In my opinion this appeal must be allowed on the first point and with the usual consequences.

FLETCHER MOULTON L.J. The only point for decision before this Court is whether a certain bankruptcy notice is or is not a good

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(1) 55 Sol. J. 314.

(2) [1911] 2 K. B. 718.

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notice under the Act. In my opinion it is not a good notice, and the objection to it is that it does not satisfy the requirements of sub-s. 1 (g) of s. 4 by requiring the debtor to pay the judgment debt in accordance with the terms of the judgment. The judgment establishes a debt of record, and it does not matter what was the cause of action which has ripened into and been merged in the judgment. The legal incidents of a judgment are either statutory or by the common law, and they are not in the least influenced by the nature of the contract out of which the plaintiffs' claim arose. In this case two persons who apparently live in Paris have sued a person in England for a debt and have obtained a judgment. The Court does not know and the Court does not care to know, (because it would be quite immaterial,) whether the original debt was incurred in England in respect of money payable in England and the creditors have changed their place of abode, or whether it was incurred in connection with things in France, or things in any other part of the world. All that can be material is that there is a judgment debt which has been obtained in an English Court, and it is the object of the bankruptcy notice to enforce that debt; i.e. to enforce the legal obligations which arise out of it. I am satisfied that the duty of a judgment debtor is to find the judgment creditor and pay to him the amount of the judgment, provided that the judgment creditor is in England; but he has no obligation to go out of the realm in order to find him. It is laid down by incontestable authorities that this is the ordinary legal obligation attaching to a debt. It is suggested that this doctrine no longer holds. Now I agree that, so long as we are dealing with contracts, the interpretation of contractual obligations may change from age to age according to the development of business transactions, because the Court in interpreting a contract will consider what its language would connote in the understanding of business men of the time. But I can see nothing which would authorize us to say that the incidents of a judgment, a debt of record, which have no relation to the matters out of which the claim arose, could change from age to age. Moreover I do not think that it is consistent with the idea of a judgment debt according to English law that it should impose upon the

judgment debtor any duty not capable of being performed within the realm. On looking at this bankruptcy notice I find that the only address of the judgment creditors which is given is an address in Paris, and it calls upon the judgment debtor to pay the debt to these people in Paris. For the reasons I have given I hold that the judgment did not authorize the judgment creditors to call upon him to do that act, therefore this bankruptcy notice is not in accordance with the terms of the judgment. It calls upon him to do something fundamentally different to and beyond that which a judgment creditor had a right to call upon him to do by reason of the judgment. Upon that simple ground I hold that this bankruptcy notice is bad. I fully agree also with the Master of the Rolls that it is important for us to take notice of the decision in *In re a Debtor* (1) and explain it, because it has clearly been misunderstood. In my opinion that decision did not intend in any way to interfere with what had already been laid down by this Court, namely, that it is sufficient that at the address given there should be an agent properly authorized to receive payment of the money and to give a discharge for the debt. That had been laid down in *In re Persse* (2), and I am certain there never was any intention on the part of this Court to depart from that decision. The objection to the bankruptcy notice in the case of *In re a Debtor* (1) was that in one part of it the debtor was directed to pay to the solicitors of the judgment creditors, not to the judgment creditors themselves, and there was an assurance on the bankruptcy notice, signed by the solicitors, to the effect that they had authority to receive. Nothing more than that was before the Court, and in my opinion the Court was quite justified in saying that it was not a proper bankruptcy notice. But I think that if the bankruptcy notice had said "Pay me at Messrs. Spyer & Son's," and Messrs. Spyer & Son possessed a power of attorney entitling them to receive the money for the judgment creditors, the decision would probably have been the other way. The decision turned entirely on the special facts of that case, and it was not intended to throw any doubt whatever on the power of the judgment creditor to arrange that the receipt of the debt shall be by a properly authorized agent at

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(2) 55 Sol. J. 314.

C. A. the address given. For these reasons I think this appeal must
1911 be allowed with the usual consequences.

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FARWELL L.J. I also am of opinion that the notice to pay in Paris is not a notice to pay in accordance with the terms of the judgment. The judgment is in the common form, that the plaintiffs do recover so many pounds. It states no place of payment, and it is obvious of course that execution might issue at once. But I am equally clear that if the defendant shewed that neither the plaintiff nor any one authorized by him to receive the amount of the judgment was available in England he would get a stay of execution on bringing the money into Court. There is certainly no direction to pay in any place. Supposing the ordinary rule, therefore, which has been established since Coke wrote upon Littleton, to apply, the debtor would have to find his creditor, provided that the creditor is within the jurisdiction. The remedy given to the creditor by s. 4 of the Bankruptcy Act is an additional remedy, and the Courts have construed that with exceeding strictness. It would be, in my view, very harsh to impose upon the debtor the further liability of pursuing his creditor abroad if the creditor did not choose to remain in England where payment could be made. The question is whether in all the circumstances the creditor can call upon the debtor to pay him out of the jurisdiction. In my opinion he cannot.

Then the second point urged was that we are bound by the recent decision in *In re a Debtor*. (1) In my opinion that case decides simply this, and I am taking the last sentence of the judgment of the Master of the Rolls: "This is a matter which is technical beyond almost anything else in proceedings at the present day, and the question is whether a bankruptcy notice can be right which departs so far from the authorized form and from the judgment itself as to say 'pay over to me or to a gentleman who says he is my solicitor.'" I can find no foundation for the argument that that was a decision that a creditor cannot demand payment to his duly authorized agent. The natural course for the foreign creditor to take is to direct the debtor to pay to him

(1) [1911] 2 K. B. 718.

at the office of the person who is authorized to receive it, and when the debtor attends there to pay, he will be met by the duly authorized agent of the creditor, who will produce his power of attorney. It seems to me perfectly simple. It was decided, on an extreme technicality, that the notice in *In re a Debtor* (1) was bad, but that case does not lay down any general rule. I therefore agree that this appeal should succeed.

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Farwell L.J.

Appeal allowed.

Solicitors: *G. B. Cohen, Dunn & Co.; R. Vaughan.*

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[IN THE COURT OF APPEAL.]

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Oct. 26.

BEVAN *v.* ENERGLYN COLLIERY COMPANY.

Employer and Workman—Partial Incapacity from Accident—Compensation—Weekly Payments—Average Weekly Earnings—Fall in Wages since Accident—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I, clause 3.

In fixing the amount of the weekly payment to be made by an employer to a workman, who has been injured by accident, under Sched. I, clause 3, of the Workmen's Compensation Act, 1906, the county court judge ought not simply to compare the wages actually earned by the workman before the accident with those earned by him at the date of the application, without considering what those wages would have been if the accident had not occurred, but he ought to have regard to extraneous circumstances, such as a general reduction in wages since the date of the accident.

James v. Ocean Coal Co. [1904] 2 K. B. 213, distinguished.

APPEAL from an award of the judge of the Glamorganshire County Court sitting at Pontypridd upon a claim for compensation under the Workmen's Compensation Act, 1906.

The workman was employed as a collier by the appellants, and on December 19, 1907, he met with an accident and sustained injuries to his right leg and arm which resulted in his being for

(1) [1911] 2 K. B. 718.

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a time totally incapacitated for work. During such total incapacity, namely, until August, 1909, the appellants paid him compensation at the rate of 1*l.* a week. In August, 1911, he commenced proceedings to have compensation awarded in respect of his partial incapacity.

Prior to the accident his average weekly earnings amounted to 2*l.* 19*s.* 1*d.* At the date of the application he was only earning about 1*l.* 16*s.* a week. There was evidence, however, that since the time of the accident the earnings of colliers in general had fallen considerably in consequence of the passing of the Coal Mines Regulation Act, 1908, which cut down the working hours of colliers to eight hours per day; and further that in this particular colliery the work was now further away from the pit's mouth than it had been at the date of the accident, and consequently that the wages which a collier could earn there would be less.

The question raised by the appeal was whether in fixing the amount of the weekly payment to be made by way of compensation under Sched. I., clause 3, of the Workmen's Compensation Act, 1906, the county court judge ought to have regard to extraneous circumstances such as the universal reduction in miners' wages brought about by the passing of the Eight Hours Act.

The county court judge held that he ought not to have regard to any extraneous circumstances, but simply to draw a comparison between the wages actually earned prior to the accident and those now earned, unaffected by any consideration as to what those wages would now have been if the accident had not occurred. On this basis he awarded a weekly payment of 11*s.* 6*d.* to the workman. But in case his view of the Act should be held by the Court of Appeal to be wrong, he awarded the workman a weekly payment of 2*s.*, that being 50 per cent. of the difference between his present wages and the wages he would have been earning now had there been no accident at all.

The employers appealed.

C. A. Russell, K.C., and *E. J. Herbert (Llewellyn Williams with them)*, for the appellants. In fixing the amount of the weekly

payment under Sched. I., clause 3, of the Workmen's Compensation Act, 1906 (1), one of the most obvious considerations to be regarded is whether the man's incapacity to earn as much wages as before is attributable to the accident or not. To say that regard cannot be had to matters which have occurred since the accident is extravagant. Independently of the accident something may happen which reduces the amount which the workman is able to earn. Such a circumstance as that ought clearly to be taken into consideration. In this case the statutory reduction of the working hours of colliers has quite apart from the accident seriously affected the earning capacity of the claimant. In declining to have regard to this diminished capacity the county court judge has excluded matters which it was material for him to consider, and his award cannot stand. In *James v. Ocean Coal Co.* (2) the Court came to the conclusion that the county court judge had in assessing the amount of the weekly payment acted on an incorrect view of the law, although his actual decision was not improper. Romer L.J. there said (3): "It would be proper for the judge, in reviewing the weekly payment, to consider the fact that the workman was being employed by his former employers at wages far exceeding the maximum compensation which could be awarded to him in case of total incapacity, and which equalled the wages he could have earned if the accident had not happened to him."

J. Sankey, K.C., and Clive Lawrence (A. T. James with them), for the respondent. The county court judge was right in his award. The case is really governed by *James v. Ocean Coal Co.* (2) It is true that the question there was how the county court judge was to arrive at the maximum compensation, but

(1) Sched. I., clause 3, provides as follows: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly

earnings of the workman before the accident, and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

(2) [1904] 2 K. B. 213.

(3) *Ibid.* at p. 223.

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C. A. the Court held that in arriving at the maximum it was not right
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to the accident which was extraneous to the man. The facts
there were almost identical with those in the present case.

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[FLETCHER MOULTON L.J. That was under the Act of 1897,
and the difference between the two clauses is material.

COZENS-HARDY M.R. The concluding words of clause 3 of the
schedule are new.]

They do not alter the principle.

[FARWELL L.J. There is such a difference as to render the
case inapplicable.]

The true construction of clause 3 is, it is submitted, that the
county court judge is not entitled to take into consideration
circumstances which do not specially affect the individual
workman.

[FARWELL L.J. The clause was meant to enable the county
court judge to do complete justice. The concluding proviso
appears to have been expressly added to meet such cases as
this.]

It seems an odd result that a man who is incapacitated should
by reason of the passing of the Eight Hours Act be entitled to
less compensation than he would have got if that Act had not
come into operation.

If the county court judge was wrong as to the award of 11s. 6d.
the case must go back to him, as he has clearly misdirected
himself as to the alternative award.

COZENS-HARDY M.R. In this important case I have come
to the conclusion that the learned county court judge has
misdirected himself.

The question arises under clause 3 of the First Schedule to the
Workmen's Compensation Act, 1906. The respondent, a collier,
in 1907 met with an accident which for a time totally incapacitated
him. His average earnings at that date were 2l. 19s. 1d. a week.
Happily, the more serious effects of his accident were removed
after a time. He was admittedly for a time only partially
incapacitated; he has been employed as a collier since; and the
question is, under clause 3, what the learned county court judge

ought to take into consideration. The case came before him to determine what compensation ought to be allowed. I will read the section: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident"—that is a constant and ascertained fact—"and the average weekly amount which he is earning in some suitable employment or business after the accident." That again is a fact which has been ascertained by the learned county court judge. It is not constant in the sense in which the first was, but it is an ascertained fact having regard to the conditions of the man at the present moment, not what he is in fact earning at the date when it comes before the arbitrator, but what he is earning or able to earn in some suitable employment or business after the accident. But that is not all the county court judge has to do; that enables him to find the maximum of the weekly payment. It cannot exceed the difference between the first limb of the section and the second. Then the clause proceeds: "but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." The learned county court judge has taken this view, which is summed up, I think, in his judgment: "I hold, therefore, that the comparison is to be with the wages actually earned prior to the accident, unaffected by any consideration of what these wages would now have been had the accident not occurred." He repudiates entirely the view that he ought to consider as one of the elements in the case what the man would reasonably have been earning or would be likely to earn if there had been no accident. In other words, if by general legislation colliers' wages have been reduced, as is the effect of the Eight Hours Act, he says that is a circumstance to which he ought not to refer. In my opinion that is a plain misdirection on his part. The words at the end of clause 3, "but shall bear such relation to the amount of that difference as under the circumstances

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of the case may appear proper," are introduced for the first time in the Act of 1906 ; they are not found in the corresponding section of the Act of 1897; and the decision in *James v. Ocean Coal Co.* (1), which, of course, is binding upon us, and with which, if it were open to me, I should not desire in any way to quarrel, seems to me to have nothing to do with the present case. I find in those words at the end of clause 3 what amounts to a positive direction that the learned county court judge ought to consider not only the amount of the man's earnings, in which I include ability to earn at the date of the accident, and the amount of earnings or ability to earn at the present time, but is to have regard to this direction: "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." If wages are going up, that is a provision which may tend very much to the benefit of the workman; if wages are going down, it may be for the benefit of the employer; but, whichever way it happens, I think it is not competent to the learned county court judge to say "I have nothing to do with that. All I have to do is to take two personal elements, the elements personal to the individual workman, and I do not go outside that." I think, therefore, the learned county court judge having awarded 11s. 6d., proceeding upon the footing which I have mentioned and disregarding the Eight Hours Act and other circumstances, the award cannot stand. But the learned county court judge has also taken what was undoubtedly a convenient course for him to take in a case which would probably go to appeal. He said: "If, however, my view of the Act is wrong, then I think the difference would be very small. I consider that the reduced capacity would not be more than 4s., and I would allow him 2s. a week in respect of the difference between his present wages and the wages he would have earned now had there been no accident at all, having regard to the fact that the Eight Hours Act has been passed, and that the work is further away from the pit's mouth, and considerations of that kind, but, inasmuch as I am of opinion that I am not entitled to take those matters into consideration, I allow 11s. 6d." If the learned county court judge had based his findings simply

(1) [1904] 2 K. B. 213.

upon the circumstances relating to this particular colliery and the fact that in this particular colliery the coal was being got further from the pit's mouth than it was when the accident took place, I should have thought that was a misdirection, but this is merely one of the circumstances to which he is referring, one of the most important being the Eight Hours Act, which, of course, is of general application. It is in evidence, and to that I attach great importance, that the Energlyn Colliery is a fair specimen of the collieries in this district. On the evidence it is clear that colliers do not earn better wages at Energlyn than at other collieries in the district. I am far from saying that the learned county court judge ought not to take into consideration amongst other things the conditions at a particular colliery in which the man was working, but I do say he ought not to have regard to that alone. He has not had regard to that alone, and I think we should be doing very wrong if we sent this case back on the suggestion that there was a misdirection because together with general considerations he has had regard to the conditions and circumstances of this particular colliery.

In my opinion this appeal must be allowed, and the award must be made for the alternative sum which the learned county court judge fixed, namely, 2s., for it is quite plain, and it has not been disputed, that apart from misdirection the question of quantum is solely for the learned county court judge. In my opinion that must be the award, and the appellants should have the costs of the appeal.

FLETCHER MOULTON L.J. I am of the same opinion, and I propose to decide this case without any reference to the previous Act, because I think the language of the schedule which we have to interpret is quite clear in itself, and, under those circumstances, it is better to avoid reference to previous legislation. But it must not be thought that by my avoiding any comparison between the Acts I think there is not great force in the argument which arises from the change which was made by the Act of 1906, and it entirely supports the conclusion to which I come on the language of the section itself.

It must never be forgotten that the duty of the learned

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county court judge on such an application as this is to assess compensation in the shape of a weekly payment. But he is not allowed a free hand. The Legislature has taken great care to prevent exorbitant compensation being given to the workman. If you look at sub-s. (b) of the first section of the First Schedule to the Act you find that it says: "Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer." So that the first maximum which is binding on the tribunal assessing compensation is half the wages that he was earning at the time. But there is a second provision for the purpose of preventing too heavy awards of compensation. It is to be found in the very same sub-section: "such weekly payment not to exceed one pound." Then when you come to clause 3 it says that in fixing the amount of the weekly payment in the case of partial incapacity "the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." So that there are three maxima; the amount must not exceed any one of those three, and therefore, of course, the learned county court judge in assessing it is bound not to exceed the lowest of them. Suppose we take X to stand for the wages which the workman was earning at the time of the accident, a fact which is fixed once for all; suppose we take Y to represent that which he is earning or is capable of earning at the time of the assessment. The three maxima are: one-half X, one pound, and X minus Y. Each of these is a maximum which the award may not exceed. But when we examine the legislation to see if there is any other guide than merely the provision of maxima, we find that there is a very important one in clause 3. After saying that the compensation shall never exceed what I have called X minus Y, it goes on to say "but shall bear such relation to the amount of that difference as

under the circumstances of the case may appear proper." Proper for what? Proper as compensation for the incapacity in question. That is what the learned county court judge has to bear in his mind. The limitations are only limitations as to the higher limit, but then, in considering what, within the liberty that is given him by the Act, he ought to do, he is directed to consider what under the circumstances of the case it is proper to award. Now in this case, without going into details, it is clear that the amount of wages earned at the time of the accident was slightly under 3*l.* ; the amount which the man is earning now is, I think, about 1*l.* 16*s.* ; that is 23*s.* less than he was earning at the time. Now let us see what the three maxima are. The first maximum would be half of 3*l.*, but that is excluded, because the second maximum says it must not be more than 1*l.* The third provision as to the maximum is that it must not exceed the difference between the earnings that he was making at the time of the accident and the earnings that he is making at the time of the review ; that would be 23*s.* The consequence is that it is clear that the learned county court judge could not award more than 1*l.*, and he is directed to award a sum to bear such relation to 23*s.* as he thinks proper under the circumstances of the case. The circumstances of the case are plainly these, that if the man had not been incapacitated at all he would only have been earning 4*s.* more than he is earning at this present moment. Extraneous circumstances have made the position of a miner such that although he is earning 23*s.* less than he did before, he cannot put down more than 4*s.* of that deficit to the consequence of the accident. The learned county court judge has to consider all these things, and to award. But he has said : " I may not consider those things ; I must only consider that he is earning 23*s.* less than he was earning at the time of the accident ; I may not consider whether that or some of that is accounted for by other circumstances, and therefore I am bound to make my award having regard to nothing but that 23*s.*, and I award 11*s.* 6*d.*" I am satisfied that that is a misdirection to himself. He was bound to consider what was the proper compensation for the incapacity, subject to the limits which were statutably put upon

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him. He states that if he felt he was at liberty to do that he would award 2s. I see no reason why we should reject that alternative finding, which appears to me to be the consequence of his applying his mind to that which it was really his judicial duty to consider, and I am therefore of opinion that we ought to amend the award in that respect.

FARWELL L.J. I have come to the same conclusion. In my opinion it turns entirely on the construction of sub-s. (b) of s. 1 of the Act of 1906. The object of the Act is to give compensation for loss of earning capacity. Sub-s. (b) provides: "Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months," and so on. The idea is as far as possible to compensate the man so as to put him in very much the same position, subject, of course, to the diminution by 50 per cent., in which he was before. It is left to the arbitrator to assess the compensation. Sub-s. 2 provides: "The average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." That relates to the first branch of clause 3 of Sched. I., under which the arbitrator has to find the amount as a fact, after due consideration of the figures, estimates, and other matters put in evidence before him: this is a matter ascertained once for all, and I will call it X, as Fletcher Moulton L.J. has done. Then he has to ascertain another matter, which may be called Y; he has to ascertain "the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." That may be actual fact, if he is earning, or, if he is not earning, estimate of what he is able to earn. These are matters which are personal to the workman, and have to be ascertained by personal considerations. That was the effect of the old Act, and it stopped there, but it is obvious that that might operate hardly on either employer or workman, and that it does not really give the fair amount, because the circumstances of the case which are not personal to the workman, but which are

applicable to workmen of the entire class of which he is one, and not merely to himself alone, could not be taken into consideration. But the Legislature has thought fit to add in mandatory terms the words "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." In my opinion the Legislature, feeling that justice might not necessarily be done in all cases unless the arbitrator was directed to look into the circumstances of the case, intentionally added those words for the purpose of enabling him to take into consideration those very matters which the learned county court judge has excluded in the present case.

I entirely agree with what the Master of the Rolls has said. The Eight Hours Act is not conclusive one way or the other, but it is a circumstance which the learned county court judge has to take into account. In the present case I think he has not followed the direction which the Act has given him, and the appeal must be allowed with costs.

Appeal allowed.

Solicitors : *Helder, Roberts & Co., for W. R. Davies & Co., Pontypridd ; Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

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[IN THE COURT OF APPEAL.]

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*Employer and Workman—Detention of Ship—Order by County Court Judge—
Right of Appeal—Court of Appeal or Divisional Court—Jurisdiction—
Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3; s. 11;
Sched. II., clause 4.*

An order for the detention of a ship, made by a county court judge under s. 11 of the Workmen's Compensation Act, 1906, is made by him not as arbitrator, having jurisdiction in all matters arising in an arbitration under the Act, but in the exercise of his general jurisdiction as a county court judge; and an appeal from such an order lies, not to the Court of Appeal directly, but to the Divisional Court.

So held by Cozens-Hardy M.R. and Fletcher Moulton L.J., Farwell L.J. dissenting.

APPEAL from an order of the judge of the Glamorganshire County Court whereby he directed the detention of the steamship *Pontiac* under the provisions of s. 11 of the Workmen's Compensation Act, 1906. (1)

Peter Panagotis, a Greek sailor, upon whose application the order was made, was serving as fireman on board the *Pontiac*, a ship which was registered in Newfoundland. While the ship was at Barry he had fallen down one of the hatches and injured himself. The ground of his application was an allegation that

(1) Workmen's Compensation Act, 1906, s. 11: "If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any Court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the Court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue

an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly."

the owners of the ship were liable as such owners to pay compensation to him under the Act in respect of personal injuries by an accident arising out of and in the course of his employment. Proceedings for compensation under the Act had been instituted, and the application for arbitration had been served upon the master of the ship before the application for detention was made. At the time of the application for detention the ship was found in the port of Cardiff. The county court judge held that the owners of the ship were probably liable as such to pay compensation, and that none of the owners resided in the United Kingdom, and he accordingly made the order applied for.

The owners appealed.

On the hearing of the appeal a preliminary objection was taken by FLETCHER MOULTON L.J. that the appeal in this case lay to the Divisional Court and not to the Court of Appeal.

A. Neilson, for the appellants. The appeal is rightly brought to this Court. Sched. II. (4.) of the Workmen's Compensation Act, 1906, gives a right of appeal to this Court when the county court judge gives any decision or "makes any order under this Act." It was held under that clause in *Moss v. Great Eastern Railway* (1) that an appeal now lies to this Court from a decision by a county court judge on a preliminary question of law, or as to his jurisdiction to entertain proceedings, and not, as formerly, only after an award has been made. This Court is meant to have control over all appeals arising under the Act.

[FARWELL L.J. This is an interim order to detain the ship with a view to subsequent arbitration.]

SECT. 11, sub-s. 1, no doubt contemplates subsequent proceedings. But here proceedings were already started. The county court judge has made the order under the Act in exercise of the powers given to him by the Act. The words of clause 4 of Sched. II. are clear—"any order under this Act."

A. Parsons and *G. M. Gathorne-Hardy*, for the respondent. It has been generally considered that in all matters arising incidentally upon arbitrations under this Act an appeal lies to

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(1) [1909] 2 K. B. 274.

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[FLETCHER MOULTON L.J. The schedules are only made part of the Act by reference: see s. 1, sub-s. 3; they are not part of the text of the Act. Sched. II. is that which is to govern arbitration. Its provisions only apply with regard to proceedings for compensation by way of arbitration.]

The schedule is headed "Arbitration, &c." The phrase "&c." must be taken to have some meaning.

[The Workmen's Compensation Rules, 1907, rr. 37 and 38, and Form 26 were also referred to.]

Cur. adv. vult.

1911. NOV. 7. COZENS-HARDY M.R. This is an appeal from an order made by the county court judge at Barry under s. 11 of the Act of 1906 for the detention of a ship found in the port of Cardiff. The order is in accordance with Form 28. Sect. 11 is obviously an adaptation of s. 1 of the Shipowners' Negligence (Remedies) Act, 1905. It does not confer any jurisdiction upon a Scotch Court. It authorizes an order to be made at any time, whether before or after an application for arbitration, and by a judge of any Court of record in England or Ireland, words which plainly include any judge of the High Court. On the construction of s. 11 it seems to me clear that the order for detention is only in aid of the arbitration, and is not part of the arbitration. I arrive at this conclusion for several reasons. The order may be made before any proceedings are instituted, and by a judge before whom no such proceedings can be taken. It may be made in England though the arbitration must be in Ireland or in Scotland. In my opinion the order under appeal was made by the county court judge not as arbitrator having jurisdiction in all matters arising in the arbitration, but as a county court judge acting in a judicial character. The exclusion of Scotch arbitrations supports this view. The question arises to whom does an appeal lie from such an order. It is said that it lies to this Court under the express language of clause 4 of the Second Schedule, but I am unable to assent to this view. Clause 4 begins with the words "The Arbitration Act, 1889, shall not

apply to any arbitration under the Act, but"—and then follow words which apply only to arbitrations under the Act. It is plain that clause 4 would have no application if the order were made by any judge of a Court of record except a county court judge, and I think it is almost equally clear that clause 4 would not apply where the order is made by a judge of county court "A" and the arbitration proceedings are pending in county court "B." This is the conclusion at which I have arrived on consideration of clause 4 taken by itself, and it is, I think, assisted by the language of s. 1, sub-s. 3, of the Act, which alone refers to the Second Schedule, and refers to the schedule as containing the provisions in accordance with which arbitration proceedings are to be carried on. I think the only appeal to this Court from any decision given, or order made, by the county court judge is where the decision or order is given or made by him as arbitrator. It follows that in my opinion we have no jurisdiction to deal with the present appeal. The appeal lies to the Divisional Court.

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FLETCHER MOULTON L.J. In this case an application was made to the judge of the county court of Glamorganshire for an order to detain the ship *Pontiac* under the provisions of s. 11 of the Workmen's Compensation Act, 1906. The ground of the application was that the owners of the ship were liable as such owners to pay compensation under the Act in respect of personal injuries by an accident arising out of and in the course of his employment caused to Peter Panagotis, on whose behalf the application was made. The ship was in the port of Cardiff. On the materials before him the county court judge found that the owners of the said ship were probably liable as such to pay such compensation, and that none of the owners resided in the United Kingdom, and accordingly made the order applied for. The present appeal is brought from that order, and there arises the preliminary question whether in a proceeding under s. 11 of the Act there is a direct appeal from the county court to this Court as in the case of awards under the Act, or whether such an order ought to be considered to be made by the judge of the county court in the exercise of his general jurisdiction as such and to be subject to

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There is nothing in s. 11 itself which relates to the question of appeal. The powers are given to "a judge of any Court of record in England or Ireland." The procedure is no doubt in aid of enforcing awards that may be made in arbitration proceedings, but the jurisdiction does not depend on such proceedings having been instituted. No arbitration proceeding need be pending at the date of the application. The judge to whom the application is made need not be and probably in most cases would not be a judge who would have jurisdiction in such arbitration proceedings. Indeed it might well be that an application would be made under this section to a judge in England in respect of arbitration proceedings which could only take place in Scotland or Ireland. Special provisions are made in the rules for the registrar of the Court in which the order is made to transmit certified copies of all records made with reference to the matter and other necessary documents to any Court in the United Kingdom where proceedings for arbitration may be instituted in the matter. In the absence of any special provision as to appeal, and from the fact that the section empowers judges not only of the county court but of the Supreme Court and other Courts of record to hear the applications, I am of opinion that the appeals from orders thereunder ought to follow the rules of procedure with regard to appeals in general from the particular Court where the application is made, unless special provisions can be found in some other part of the Workmen's Compensation Act, 1906, to the contrary. The counsel for the appellant claims that this is the case and refers us to s. 4 of the Second Schedule, which says (omitting non-relevant words) that "the decision of the judge on any question of law . . . in any case where he himself settles the matter under this Act or where he gives any decision or makes any order under this Act shall be final unless . . . either party appeals to the Court of Appeal." This he contends is wide enough to cover orders made under s. 11.

It may be taken that if these words were to be found without qualification in the enacting portion of the Act the language is wide enough to cover orders made under s. 11 of the Act. But

you cannot judge from the words of a schedule alone the enacting effect of those words. The schedule only takes that place in the enactment which is given to it by the words in the enacting portion of the Act which refer to it and thereby shew its relation to the enacting portion of the Act. In the present case the schedule is only referred to in s. 1, sub-s. 3, and exists only for the purposes of that sub-section. This sub-section reads as follows: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies) or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

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Sched. II., therefore, is simply a code of rules regulating arbitrations under the Act, and its effect is the same as though s. 1, sub-s. 3, had terminated in the words "in accordance with the following rules" and Sched. II. had been set out in full immediately after as part of that sub-section. It follows, therefore, that the wide language of clause 4 of the Second Schedule, while sufficient to cover all orders made by the county court judge in arbitrations under the Act, has no reference whatever to orders made under s. 11 which are not made in the course of arbitrations.

For this reason I am of opinion that the order was made by the county court judge in virtue of his statutory jurisdiction as such, and that the appeal must be governed by the general statutory provisions as to appeals from county courts. The appeal, therefore, ought to have been brought to a Divisional Court, and we have no jurisdiction to hear it.

FARWELL L.J. In this case I regret that I am unable to agree with the other members of the Court. The Act of 1906 is divided into three parts, the first part being in the usual form of Act followed by three schedules: I do not know the reason of such division, which is extremely inconvenient for purposes of reference, but in my opinion the schedules must be treated as

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parts of the Act, and the Act must be read as if it were divided into parts with sections running on in the usual way. As Lord Esher says in *Attorney-General v. Lamplough* (1), "With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part"; and in *Allen v. Flicker* (2) both Denman C.J. and Patteson J. treat it as possible for an earlier Act to be repealed by the construction of a schedule to a later Act. It must of course depend in a great measure on the nature and wording of the schedules: thus in the present Act the Third Schedule contains a list of diseases and processes without more: this schedule has reference to and is restricted by the enactments in the body of the Act; but Scheds. I. and II. contain words of express enactment and are as much actual enactments as the body of the statute itself.

Now the present Act provides by s. 1, sub-s. 1, that the employer shall be liable to pay compensation in accordance with the First Schedule, and by s. 1, sub-s. 3, that if any question arises in any proceedings under the Act as to the liability to pay compensation under the Act or as to the amount or duration of such compensation the question shall be settled by arbitration in accordance with the Second Schedule. Then s. 11 introduces a clause not germane to the arbitration, but for the purpose of securing to the workman the fruits of the arbitration, if any. It enacts as follows: "(1.) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any Court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the Court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee

(1) (1878) L. R. 3 Ex. D. 214, at p. 229. (2) (1839) 10 Ad. & E. 640.

thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly. (2.) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding. (3.) Section 692 of the Merchant Shipping Act, 1894, shall apply to the detention of a ship under this Act as it applies to the detention of a ship under that Act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected." It is a procedure analogous to that of the old Court of Chancery, a procedure *ad interim* referred to in *Mitford on Pleadings*, p. 5, and explained in *Hayward v. East London Waterworks Co.* (1) and in *Stevens v. Chown* (2), and applied in cases where it was necessary for the Court to interfere in order to keep things in *medio* until the rights of the parties were determined by another Court, which alone had jurisdiction to settle their rights. In s. 11, the judge "of any Court of record in England or Ireland" includes but is certainly not confined to county court judges, and the procedure is obviously no part of the arbitration, because the security to be given is "to abide the event of any proceedings that may be instituted to recover such compensation." So, far therefore, the Act has given compensation and has provided the means for ascertaining it, and has also given in the case of ships an independent power outside the arbitration to secure such compensation. Then comes s. 4 of Sched. II., and I think that, on a fair reading of the Act and schedules as a whole, the words "or where he gives any decision or makes any order under this Act" are not restricted to arbitration, but are general and extend to orders

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(1) (1884) 28 Ch. D. 138, at pp. 145, 146.

(2) [1901] 1 Ch. 894, at p. 901.

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made under s. 11 of the Act. The Act enables orders to be made not only by county court judges but by any judge of record. It is true that s. 1, sub-s. 3, of the Act deals only with arbitrations and is the only section that refers to the Second Schedule; but the Act creates in s. 11 a power in the county court judge outside and irrespective of the arbitration, and contains in Sched. II., clause 4, words wide enough to cover orders made under that power: the judge referred to in this paragraph is obviously the county court judge, and the words "where he gives any decision or makes any order under this Act" ought not in my opinion to be restricted to orders made in the arbitration only, when the Act has given him powers to make other orders outside the arbitration. I am influenced by the unnecessary trouble and expense caused to suitors by any other construction: if the order under s. 11 is made by a judge of the High Court in England or Ireland the appeal is to the Court of Appeal in England or Ireland, as the case may be, and in all orders made in arbitrations under the Act the appeal is the same; it seems impossible that the Legislature can have intended that in the one case of an order made by a county court judge under s. 11 the appeal should be to the Divisional Court before it comes to the Court of Appeal. Apart from the unnecessary multiplication of appeals, there is the practical consideration that orders under s. 11 are urgency orders calling for speedy determination, and that the Court of Appeal is always accessible, while Divisional Courts have to be formed and sit only from time to time. In a case where the words are at least ambiguous I think that these considerations ought to have weight, and I accordingly am of opinion that the appeal is rightly presented to this Court.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Donald Maclean & Handcock, Cardiff.*

Solicitors for respondent: *Burton, Yeates & Hart, for Hughes, Barry.*

G. A. S.

[IN THE COURT OF APPEAL]

LEE *v.* THE OWNER OF THE SHIP BESSIE.

C. A.

1911

Oct. 26 ;

Nov. 7.

Employer and Workman—Death of Workman from Accident—Compensation—Dependency—Infant Children—“Dependent upon the earnings of the workman at the time of his death”—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13 ; Sched. I. (1.) (a) (i.) and (ii.).

The widow of a workman applied on behalf of her two infant children for compensation under the Workmen’s Compensation Act, 1906, in respect of his death in 1909 by an accident arising out of and in the course of his employment. The applicant had been deserted by her husband in 1903 and had gone to live with another man, taking her children with her. There was no evidence that the deceased had ever supported the children. The county court judge, before the decision of the House of Lords in *New Monckton Collieries, Ltd. v. Keeling* [1911] A. C. 648, found that the children were dependants and awarded them compensation. An appeal by the employer was allowed on the ground that dependency was now a question of fact, and that there was no evidence to support the decision of the county court judge, Fletcher Moulton L.J., however, being of opinion that the case ought to go back for rehearing so that the county court judge might determine whether there was such a reasonable probability that the father might have been compelled to fulfil his legal obligation to support the children as would justify a finding that there was to some extent dependency.

Per Fletcher Moulton L.J. : “The decision of the House of Lords in *New Monckton Collieries, Ltd. v. Keeling*, although it does not refer to the case of infant children, logically carries with it the result that, in their case, the county court judge is bound to consider the practical value of the father’s legal obligation to support them, and that if he comes to the conclusion that there is a reasonable probability that this will be enforced in the future he is entitled and bound to hold them to be dependants and to award compensation accordingly.”

The rule that there is no legal presumption of dependency applies to the case of infant children.

Briggs v. Mitchell (1911) 48 Sc. L. R. 606, approved.

APPEAL from an award of the judge of the Bridgwater County Court, sitting as arbitrator under the Workmen’s Compensation Act, 1906.

In this case the widow of Robert Lee applied on behalf of herself and their two legitimate infant children for compensation in respect of his death by an accident arising out of and in the course of his employment by the respondent, the owner of the ship *Bessie*. The question arising upon the

C. A. arbitration was whether the widow and children were dependent upon the deceased, who was mate of the *Bessie*, which
 1911 foundered at sea with all her crew in 1909. The widow had
 LEE been deserted by her husband in 1903, and had subsequently
 v. gone to live with another man, taking her two children with
 OWNER OF her. The county court judge found that the widow was not a
 SHIP BESSIE, dependant, and from that there was no appeal. There was no
 evidence before the judge that the deceased had ever supported
 his children since 1903, but his mother gave evidence to the
 effect that he had offered to her to support them, and that on
 one occasion he had given her money to give to the wife, who
 had refused it, saying that he ought to send her money
 regularly to support his children. The county court judge
 found that the children, whose ages at the death of their
 father were respectively eight and ten, were dependants, and
 he awarded them 195*l.* by way of compensation. He made his
 award before the House of Lords had decided in *New Monckton
 Collieries, Ltd. v. Keeling* (1) that there was no legal presumption
 of dependency even in the case of a wife, but that the question
 of dependency in each case was one of fact.

The owner of the *Bessie* now appealed against the award.

Neilson and *P. Lloyd-Greame*, for the appellant. Since the
 decision of the House of Lords in *New Monckton Collieries, Ltd.
 v. Keeling* (1) the question of dependency is one of fact. There
 was no evidence before the county court judge upon which he
 could find that the children were dependent upon the deceased.
 They were in fact maintained by the mother and the man with
 whom she lived. Dependency being a question of fact, the award
 was clearly wrong. [They also referred to *Briggs v. Mitchell*. (2)]

Rayner Goddard, for the infants. This Court will not interfere
 with the finding of the county court judge on a question of
 fact. The judge was entitled to take into consideration the
 question whether the father was likely either voluntarily
 or under compulsion to provide for his children. There
 was evidence that he offered to send money for their support.
 If the children had become chargeable to the poor

(1) [1911] A. C. 648.

(2) 48 Sc. L. R. 606.

law authorities there was a strong probability that he might have been compelled to contribute. The case ought to go back to the county court judge with an intimation from this Court that there was evidence upon which he could find that the children were in fact dependent. The children had a valuable interest in their father's life which could not be waived or prejudiced by the action of others. The question of the dependency of children was not considered in *New Monckton Collieries, Ltd. v. Keeling*. (1)

Neilson in reply.

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Cur. adv. vult.

1911. Nov. 7. COZENS-HARDY M.R. This is an appeal from an award of 195*l*. in favour of two infant children of a deceased workman. The award can only be supported on the ground that the children were dependants, i.e., "wholly or in part dependent upon the earnings of the workman at the time of his death." Now it has recently been held by the House of Lords in *Keeling's Case* (1) that dependency is a question of fact, and that there is no legal presumption of dependency, even in the case of a wife. It is my duty loyally to follow that decision, and I can see no ground for not applying it to the case of infant children. In the recent case of *Briggs v. Mitchell* (2) the Court of Session, differing from the view of this Court, which was overruled by the House of Lords in *New Monckton Collieries, Ltd. v. Keeling* (1), held that there was no presumption in the case of infant children. This Scotch decision must, I think, be regarded as good law.

Now, in the present case there was no evidence of dependency in fact. Since 1903 the infant children have not been in any way maintained by their father. They have resided with and been maintained by their mother, who has been living in adultery with a man by whom she has had several illegitimate children. All this is beyond dispute. The learned county court judge gave his decision before the House of Lords had overruled the decision of this Court. I am bound to say the decision of the learned county court judge cannot now be supported.

(1) [1911] A. C. 648.

(2) 48 Sc. L. R. 606.

C. A. 1911 <hr/> LEE v. OWNER OF SHIP BESSIE. <hr/> Cozens-Hardy M.R.	It has been argued that the case ought to be sent back to the county court judge in order that he may consider whether a case can be established on behalf of the infants of dependency in fact: I think it would be wrong to do this. No evidence was adduced in favour of dependency in fact, and it was for the applicants to establish their case.
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In my opinion there is no course open to us but to allow this appeal.

Having regard to the position in life of the infants and to the serious question involved, we appointed the official solicitor to defend the appeal, and by our order we provided for his costs, and I desire to add that Mr. Goddard has greatly assisted the Court by his argument on behalf of the infants.

FLETCHER MOULTON L.J. In this case the widow of Robert Lee applied on behalf of herself and his two legitimate infant children as dependants for compensation in respect of his death by an accident arising out of and in the course of his employment by the respondent, the owner of the ship *Bessie*. No question arises as to the accident or the employment, the sole question being whether the widow and children were dependants of the deceased man. The widow had been deserted by her husband and subsequently, on the report of his death, lived with another man. The learned county court judge found that the widow was not a dependant, and from that decision no appeal is brought. But he found that the two infant children (who were aged ten and eight respectively at the death of the father) were dependants, and awarded them the sum of 195*l.* accordingly. From this decision the respondent appeals.

It is now settled law that dependency is wholly a question of fact, and, therefore, if there was any evidence to support the decision of the county court judge that the infant children were dependants we ought not to allow the appeal. The note by the county court judge of the evidence is very meagre. There is no dispute as to the ages or the legitimacy of the children. It would seem that at the hearing the widow gave evidence that her husband left her and lived with another woman, and that she heard four years afterwards that he was dead. She gives no

evidence as to his having given her money for the support of the children. The mother of Robert Lee also gave evidence, and stated that the deceased used to give her money from time to time, and that he made an offer to support his children. She also states that on one occasion he gave her money to give to the wife, but that the wife refused to take it, saying that he ought to send her money regularly himself to support his children, and that after this he assaulted her and then left her and never paid anything to support his children. Although the widow does not seem to have been asked any question on the subject of this conversation with the mother of the deceased, I think it must be taken that he never actually gave any money to his wife for the support of the children. I am unable to find from the judge's note at what date the husband left his wife, but the learned judge expresses himself satisfied that her adultery was brought about by her husband's desertion of her and his reported death. This refers to a report spoken to in the evidence of the widow and stated by her to have occurred about four years after her husband's desertion. I conclude on the whole that this desertion must have taken place when the younger child was little more than an infant, though this is mainly conjecture. The case was argued on the basis that since the desertion by the father the mother had supported the children by her own labour, or that they had been supported by the man with whom she was living, but I can find no express reference to this in the judge's notes.

The law as to what constitutes dependency in the case of a wife has been fully laid down by the House of Lords in their decision in the case of *New Monckton Collieries, Ltd. v. Keeling*. (1) There is no presumption of law that a wife is dependent on her husband's earnings merely because of his legal obligation to maintain her. But on the other hand this legal obligation is not to be ignored in deciding on the fact of her dependency. In the leading opinion Lord Atkinson, after laying down these principles, goes on to say: "On the contrary, the existence of the obligation, the probability that it will be discharged, either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not

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discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife, at the time of her husband's injury, looked to his earnings for her maintenance and support in whole or in part. It is one of the many elements to be taken into account." Of the other learned Law Lords who took part in the appeal, the Lord Chancellor formally agreed with the opinion of Lord Atkinson from which I have already quoted. He adds a few remarks in which again he makes it clear that in his opinion the fact that a legal duty lies upon the workman to provide maintenance is an element to be considered. Lord Robson was of the same opinion, as is shewn by the following extract: "The wife does not necessarily cease to be dependent on the husband simply because the latter refuses to recognize or perform his obligation and succeeds in throwing the burden of her maintenance for the time being on the wife's parents or friends or on the State. They may fulfil the husband's duty for him, but the wife's legal dependence is still on him, and not on them, and his death deprives her of the proper stay and support on which alone she is entitled to rely." He also expresses his approval of several previous decisions in which a wife who was living separate from her husband at the date of his death and receiving no support from him was yet held to be dependent upon him.

In my opinion the effect of this decision is that legal obligations to support must not be taken at their theoretic value, but at their practical value. For instance, the mere fact that a husband is bound to support his wife does not establish that she is totally or at all dependent upon him within the meaning of the Act if the circumstances are such that there is no reasonable probability that her rights would have been practically and effectually asserted. But if on the evidence there is any fair probability that the legal rights would at any future time have been actually and effectually asserted by the wife, then there is evidence of dependency, and the compensation must be regulated by an estimate of her practical loss subject to the provisions of the Act. That this is so is made very clear by a passage in the opinion of Lord Robson. In the course of his judgment he says: "The money coming to a widow under the

Act is not a present in consideration of her status: it is a payment by a third person to compensate her as a dependant, for her actual pecuniary loss by her husband's death, and where her husband's death does not, in the circumstances of the particular case, involve any real detriment to her pecuniary position, there is no rule of law to prevent the arbitrator from finding that, though married to the deceased, the applicant was not in fact dependent on him."

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I have now to consider in the light of this decision the position of the children. Up to a certain age a father is compellable by law to support his infant children. It may well be that the compulsion is indirect, and can only be effected through the medium of the poor law. To my mind this is immaterial. We have to consider the practical value of the existence of this legal duty, and though this may be modified by the indirectness of the machinery by which it is enforced it is not taken away. Indeed, in certain respects I think that the practical value of the obligation to support infant children is more likely to survive their absence from the father than is the practical value of the obligation to support a wife. The wife's absence from her husband is often the result of her own choice or of her own conduct, and where she has done nothing to dis-entitle her to support from her husband it must be more or less by her own choice that she does not compel him to contribute to her support, since he is legally bound to do so if she chooses to enforce her legal rights. But no such thing can be said in the case of infant children, at all events so long as they are incapable of work and cannot do anything themselves to decide by whom they are to be maintained or with whom they shall live. One can easily imagine cases in which they ought to be held to be almost wholly dependent on the father, as, for instance, when they are being supported by a mother who is herself too ill to be able much longer to work. In my opinion, therefore, the decision of the House of Lords in *New Monckton Collieries, Ltd. v. Keeling* (1), although it does not refer to the case of infant children, logically carries with it the result that in their case the county court judge is bound to consider the practical value of the father's legal obligation to support them, and that if he

(1) [1911] A. C. 648.

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comes to the conclusion that there is a reasonable probability that this will be enforced in the future he is entitled and bound to hold them to be dependants and to award compensation accordingly.

In applying this law to the facts of the present case I am met with two difficulties. In the first place the extreme meagreness of the notes leaves me in great doubt as to the material which the county court judge had for the purposes of his decision. For example, the question whether the mother was likely to be able to support her children if the man with whom she was living refused to do so may have been partly answered by the appearance of the woman herself who gave evidence. The mode in which she was able to support them in the past does not seem to have been gone into. It is said that it is for the applicant to make out his case. This is beyond question, but we must, in the case of infant children and under circumstances such as the present, look closely into what passed at the trial to see that their rights were duly considered. This leads me to the second difficulty, which to my mind is a very serious one. I do not think that the learned county court judge appreciated rightly the issue which he had to try, and this by no fault of his own, but from the position in which the decisions stood at the time. The decision in the House of Lords in *New Monckton Collieries, Ltd. v. Keeling* (1) was not before him, and I have no doubt that he thought he was justified in acting on legal presumption unless the case were such as to afford very strong evidence in rebuttal. I hesitate, therefore, on the one hand to accept his finding of dependency as binding upon us by virtue of its being a finding of fact, and on the other hand I do not think it fair for us to decide on the meagre note of the evidence and the facts which was taken by him in the view that he was entitled to act on the legal presumption of dependency. The proper course for this Court to adopt, therefore, in my opinion, would be to send the case back for a rehearing, when the county court judge would be able to determine whether there was such a reasonable probability that in the future the father would be called upon to fulfil his legal obligation to support his children as would justify him in finding that there

(1) [1911] A. C. 648.

was to some extent dependency. But as my brethren are of a different opinion their views must prevail.

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FARWELL L.J. I am of opinion that this appeal succeeds. The award of the county court judge is obviously founded on decisions of this Court which have since been overruled by the House of Lords. It is now settled beyond controversy that dependency is a question of fact and not of law. As Lord Atkinson says in *New Monckton Collieries, Ltd. v. Keeling* (1), "It may be that her husband was in law bound to maintain her, but it is by the discharge of this obligation, not by its mere existence in law, that a husband supports and maintains his wife"; and Lord Shaw says (2): "The Act of Parliament seems to say: Among the relatives of the deceased workman, if there be those who depended for support upon his earnings, and who by his death have lost that support upon which they depended, then let them be compensated for that loss." In the present case the wife had been living with another man for the last eight years and had had children by him. During the whole of those eight years she had the custody of her two legitimate children by her husband, and had maintained them without his assistance. It appears that at some time unfixed the husband made an offer to his own mother to support his children and once at some unknown date gave his mother some money to give to his wife which she (the wife) refused. It is clear on the evidence that the husband has not maintained his children at all since 1903. But then Lord Atkinson's observations in [1911] A. C. at p. 653 are relied on. They have already been read by my brother Fletcher Moulton and I will not read them again. They begin "On the contrary, the existence of the obligation," and go down to "to be taken into account." In my opinion they have no reference at all to a case like the present, but refer to a case such as that mentioned in [1911] A. C. at p. 657, of a man leaving his wife and children dependent on charity for a month or two in order to go and look for work and dying while away. It would be impossible in such a case to hold that the mere fact that the man at his death was earning nothing and that his

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(1) [1911] A. C. at p. 650.

(2) *Ibid*, at p. 657.

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wife and family were supported by charity was sufficient to take them out of the Act ; but I cannot think that Lord Atkinson meant that the possibility that the guardians might make the father pay for the support of his children or of any of the other persons for whom he is liable to the guardians, such as his own parents and grandparents, makes them dependants when they have not in fact been supported by him either at all or for years before his death. Such a construction is inconsistent with the whole tenor of his judgment. Moreover, the liability to support a wife, which was the case before the House, is of a different character from the liability to support a child ; the former can be enforced by the wife herself by her power to bind the husband to pay for necessaries ; the latter cannot, and is really a liability to the guardians, not to the child. See *Shelton v. Springett*, where Maule J. says (1): "People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked, is, then, the son to be left to starve,—the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts."

The Scotch decision in *Briggs v. Mitchell* (2) is in accordance with my view. I concur with the Master of the Rolls.

Appeal allowed.

Solicitors for appellant : *Holman, Birdwood & Co.*

Solicitor for the infants : *The Official Solicitor.*

(1) (1851) 11 C. B. 452, at p. 455

(2) 48 Sc. L. R. 606.

[IN THE COURT OF APPEAL.]

CALICO PRINTERS' ASSOCIATION, LIMITED v.
HIGHAM.

C. A.

1911

Oct. 19 :

Nov. 7.

*Employer and Workman—Compensation—"Weekly Payment"—Redemption—
—"Where the incapacity is permanent"—Basis of Commutation—
Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., clause 17.*

Upon an application, under Sched. I., clause 17, of the Workmen's Compensation Act, 1906, to redeem a weekly payment which has for six months been paid to a workman by his employer in respect of total or partial incapacity, resulting from an accident arising out of and in the course of the employment, it is the duty of the arbitrator, after hearing evidence, to determine whether the incapacity is or is not permanent. If it be permanent, the redemption must be upon the 75 per cent. basis directed by the first part of clause 17. If it be not permanent, the arbitrator must fix the lump sum for redemption in his discretion having regard to the evidence before him.

National Telephone Co. v. Smith (1909) 46 Sc. L. R. 988, disapproved.

Norman & Burt v. Walder [1904] 2 K. B. 27, commented on per Fletcher Moulton L.J.

APPEAL from an award of the judge of the Lancaster County Court on an arbitration under the Workmen's Compensation Act, 1906.

The workman, who was earning 29s. 3d. a week, met with an accident in July, 1909, resulting in the loss of his finger and the stiffening of his thumb. His physical injury was admittedly permanent. Half wages were paid by the employers on the footing of total incapacity from the date of the accident. On December 1, 1910, the employers applied to review the amount of the weekly payments, when the arbitrator, upon evidence, held that the then earning capacity of the workman was 20s. a week, and he reduced the compensation to 9s. 3d. a week. After this payment had continued for six months the employers applied, under Sched. I., clause 17, of the Act, to redeem the weekly payments by a lump sum. No evidence was adduced upon this application by either side as to the permanency of the incapacity. It was admitted, however, that the man had since the review worked for four weeks for his old employers as a labourer, that his wages

C. A. were less than 20s. a week, and that he had since been carrying
1911 on business in a shop for the sale of fried potatoes, called a
"chip shop."

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The county court judge thought he was bound by the decision in *National Telephone Co. v. Smith* (1), and held that there was a permanent incapacity of 9s. 3d. a week, the liability for which could only be redeemed on the actuarial basis provided by the first part of clause 17, and that the amount could not be settled by arbitration under the Act. He accordingly made an award that the employers should be at liberty to redeem, if so advised, by payment into Court of 312l.

From this award the employers appealed.

There was a cross-appeal by the workman on the ground that the award ought not to have left an option to the employers to redeem or not as they pleased.

Atkin, K.C., and *Wingate Saul*, for the appellants. It is plain that the effect of the decision in *National Telephone Co. v. Smith* (1) was that where the injury to the workman was permanent the sheriff was entitled to assess the amount to be paid in redemption of the weekly payment on the basis of permanent incapacity without any inquiry as to whether the incapacity was in fact permanent. That is the very inquiry which has to be prosecuted. The employers' application to redeem was based upon the second part of clause 17 of the First Schedule to the Act, and they desired to have an arbitration. Clause 17 clearly involves the determination by the county court judge of the question whether the incapacity is permanent or not. *National Telephone Co. v. Smith* (1) decided that where the physical injury is permanent the county court judge had nothing more to consider and was entitled to proceed upon the basis that the incapacity was permanent. That decision cannot be supported. The injury in this case is plainly permanent, but the question is whether the incapacity is permanent. The test is whether the conditions of the workman's incapacity are stable. The county court judge has ignored the question of change in the conditions. The man had altered his mode of life and gone into business.

(1) 46 Sc. L. R. 988.

If the county court judge is right, then in a case where there was a suspensory order of 1*d.* per week the workman might only get 75 per cent. of the value of that weekly payment. If it is the measure of the weekly payment for the past six months which determines the question of permanent incapacity the employers might give the man light work, and so reduce the weekly payment, and then apply to redeem. The county court judge has taken a wrong view of the law and the case ought to go back to him.

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C. A. Russell, K.C., and *Adshead Elliott*, for the respondent. It was agreed before the county court judge that the injury was permanent and that the physical condition of the workman would undergo no change. That being so, his incapacity to work and earn wages must necessarily also be permanent. The physical condition of the workman is the first step. If it is admitted or proved that his physical condition is not likely to change, then the next question is whether the difference in his earning capacity is unchangeable. Upon the application to review on December 1 the county court judge held that the claimant was at that time able to earn 20*s.* a week, and he accordingly fixed the amount of the weekly payment at 9*s.* 3*d.* Upon the application to redeem the physical condition of the claimant was unaltered. It was further admitted that he had never in fact since the review earned as much as 20*s.* a week, and the employers did not bring any evidence to shew that there was anything abnormal in the condition of the labour market. When a workman has established that the injury which he has sustained is one which will not alter, he has in fact established that his incapacity is permanent. It is for the employers to prove the contrary. The county court judge has found that there is a permanent partial incapacity of 9*s.* 3*d.* a week, and he was right in assessing the sum for redemption upon the actuarial basis prescribed by the first part of the section.

Wingate Saul in reply. Under s. 1, sub-s. 3, of the schedule the arbitrator is entitled to take into consideration the workman's earnings in business. That section followed upon the decision in *Norman & Burt v. Walder*. (1) The employers adduced

(1) [1904] 2 K. B. 27.

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evidence to shew that by reason of the man's business earnings there was a change of circumstances. It was for the workman to shew that his incapacity to earn was permanent. The county court judge has treated the proceedings upon the application to review as equivalent to the preliminary inquiry which he ought to have held upon this application. He was not justified in doing that.

Cur. adv. vult.

1911. Nov. 7. COZENS-HARDY M.R. This appeal raises for the first time in this Court a question as to the meaning of clause 17 of the First Schedule to the Act of 1906. Compensation under the Act is payable where incapacity for work, whether total or partial, results from an injury. It is given in the form of a weekly payment lasting during the incapacity. Provision is made for reviewing any weekly payment at the request of either employer or workman. But there is no provision for redemption of a weekly payment except by agreement until clause 17 is reached.

That clause, so far as material, is as follows: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment and in any other case may be settled by arbitration under this Act." Now, three points are clear: (a) The right to redeem is given to the employer only; there is no corresponding right given to the workman to claim a capital sum. (b) This right cannot be exercised hastily; the weekly payment must have been continued for at least six months. (c) A broad distinction is drawn between an incapacity to work which is "permanent" and one which is not "permanent." This distinction may sometimes be to the benefit of the workman and sometimes to his detriment. The arbitrator has, if the incapacity is "permanent," no discretion as to the amount. He cannot award less or more than 75 per cent. of the actuarial value. If it is not

“permanent” the arbitrator must fix the lump sum in his discretion, having regard to the evidence before him.

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Apart from these three points, there are others which are by no means clear. Does the 75 per cent. apply only where there is total incapacity? I think not. It seems to me that there is no ground for holding that partial incapacity may not be “permanent.” Whatever else that word may mean, it is not equivalent to total. The great difficulty is as to the meaning of the word “permanent.” In reviewing a weekly payment under clause 16 the arbitrator must deal only with existing facts, and must not prophesy or speculate as to the workman’s future condition. But in redeeming under clause 17 he is bound to speculate. He must not rest content with finding that the weekly payment which has been continued for six months is at the moment the proper sum. He must start with the assumption that the existing weekly payment is proper; but he must go further, and ascertain as best he can whether that payment is likely to be proper during the rest of the man’s life. Is his condition stable; or is there a probability that he will get better or worse? If his condition is stable, the incapacity is “permanent” within the meaning of the clause. If it is not stable, the 75 per cent. basis has no application. To give an example: A weekly payment of 1*d.*, under what is known as a suspensory award, plainly could not be redeemed on the 75 per cent. basis. The suspensory award on its face indicates uncertainty as to the man’s future condition.

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It follows that in my opinion the first duty of the arbitrator is, after hearing evidence, to arrive at a conclusion that the incapacity is or is not “permanent” in the sense in which I have explained the word. The problem is difficult, no doubt; but it is not beyond the wit of man. So long as the arbitrator does not misdirect himself his conclusion of fact will not be interfered with.

In the Court of Session a different view has prevailed. In *National Telephone Co. v. Smith* (1) it was held by Lord Dundas and Lord Ardwall that where a man was in receipt of half wages in consequence of total incapacity the 75 per cent. rule must be

(1) (1909) 46 Sc. L. R. 988.

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applied, and that no preliminary inquiry was necessary to ascertain whether the incapacity was permanent. Lord Low thought a preliminary inquiry necessary. With the utmost respect, I am unable to follow the view of the majority. The fact that a man has been properly in receipt of compensation to the amount of half wages for six months is quite consistent with his incapacity not being total during the whole of the remainder of his life.

In the present case the man lost a finger and his hand was lacerated. The physical injury, which is different from the incapacity, is undoubtedly permanent. Half wages were paid by the employers on the footing of total incapacity. In December, 1910, there was an application to review. The arbitrator, upon evidence, held that the man's then earning capacity was 20s. a week, and reduced the compensation to 9s. 8d. It is this reduced payment which the employers apply to redeem. It is remarkable that no evidence was adduced by either side as to the permanency of the incapacity. It was admitted that he worked for four weeks for his old employers, apparently as a labourer, and that his wages were less than 20s.; since which he has carried on business at a chip shop. The arbitrator has awarded on the 75 per cent. basis, if the employers elect to redeem; and, whether they elect to redeem or not, has ordered them to pay the costs.

Now, in my opinion, there was no evidence to justify this award. The proper issue was not dealt with by the learned county court judge. The applicants did not give any evidence relevant to the material issue. But as the costs have been thrown upon the applicants, I think the proper course is to send the case down for a new trial in order that the proper question may be considered and tried. The costs up to the present time must be paid by the applicants.

There is a cross-appeal by the workman, who objects that the employers ought to be ordered to pay the ascertained redemption money. It has been very reasonably agreed between counsel that in the event of the judge making his award in the same form the existing notice of appeal shall be deemed to apply to the new award. Should the new award be in a different form, the appeal may be mentioned as to costs. Meanwhile the appeal stands over generally.

FLETCHER MOULTON L.J. In this case the applicant suffered an accident which led to the amputation of his first finger. Initially he received compensation at the rate of 14s. 7½d. a week, but on December 1, 1910, the award was reviewed at the instance of the employers, and it was then reduced to 9s. 3d. per week. After this payment had continued for more than six months the present application was made by the employers to redeem the weekly payment. It was contended that inasmuch as it was admitted that the physical injury to the workman was permanent the commutation must be arrived at by the first alternative given in the clause which provides for redemption, i.e., that 75 per cent. of the actuarial value of the weekly payment must be awarded. The learned judge has accepted that contention and has accordingly fixed the commutation at 312l. Against this decision the present appeal is brought.

This raises for the first time important questions as to the construction and effect of the 17th clause of the First Schedule of the Act, which provides for the redemption of weekly payments on the application of the employers. By its terms the application can only be made after a weekly payment has been continued for not less than six months. The sum to be given in redemption is to be determined actuarially in cases where the incapacity is permanent, and by arbitration in other cases. The two phrases needing interpretation are "weekly payment" and "where the incapacity is permanent."

The opening words of the section are "Where any weekly payment has been continued for not less than six months." I am clear that the phrase "weekly payment" means a weekly payment of a certain constant amount. This is evident from the fact that later on there is a reference to an annuity "of the annual value of the weekly payments"—an expression which would be meaningless unless the weekly payment referred to was a definite sum. I am therefore of opinion that the clause does not come into operation until a weekly payment of constant amount has continued for not less than six months. The object of the provision is evidently to restrict the operation of the clause to cases in which matters have more or less attained a stable condition.

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There is a greater difficulty in arriving at the interpretation of the phrase "where the incapacity is permanent"; but it must be remembered that "incapacity" in this important schedule means incapacity for work (see s. 1, sub-s. 1 (b)); and the compensation to be given depends on the effect of that incapacity on the power to earn wages, and varies with it. Consequently I am of opinion that the phrase "where the incapacity is permanent" refers to cases where in all reasonable probability the weekly payment will not vary by going either up or down. Such cases are clearly cases where the actuarial value of such a payment for life is a suitable guide for the purposes of commutation. It may be asked why, if such is the case, the amount to be paid to the workman should not be the full actuarial value of the payment which by hypothesis is expected to continue for his life, but only 75 per cent. of it. But it must be remembered that what is called the actuarial value of such a payment is based on the expectation of life of a healthy man of the same age; and the Legislature may well have thought that in all probability a workman suffering from permanent incapacity would not have so good an expectation of life as a perfectly healthy man. Or it may have thought that it was in the interest of workmen that redemption should take place, because it frees them from any risk of loss by the bankruptcy of private employers, or the winding up of companies, or because a workman might be able to put to good use in some small business the capital sum which he would thereby receive, and accordingly fixed the amount at 75 per cent. of what would be the actuarial value of the obligation to make the weekly payments in order to induce employers to redeem. It is not the duty of the Court to determine the motives of the Legislature for what it has done, but I have no doubt that it was from some or all of these considerations that it was led to fix the amount of the redemption money at less than the actuarial value of an annuity equal in amount to the weekly payment.

It will be seen, therefore, that in my opinion incapacity is not permanent if there is a practical possibility of the weekly payment being increased or diminished. The actuarial method of calculating the commutation is prescribed only when the facts

are such that the weekly payments which constitute the compensation have arrived at a condition of stability. If it were not so, this provision might lead to gross injustice to the workman. For example, nothing is more common than for a workman to be taken back for light work by his employers, and to be paid liberal wages for it, the weekly payment being adjusted according thereto. It would be most unfair if the employer could, after paying such weekly amount for six months, apply for commutation, admitting that the incapacity was permanent, and demand that the sum should be fixed on an actuarial basis. After paying the commuted sum there would be no obligation on the employer to continue to employ the man at the wages previously given; and he might not be worth equally high wages in the labour market. A still more glaring injustice would be done in a case where the weekly payment is reduced to 1*d.* per week by reason of the fact that the injury, though permanent, does not at the time diminish the wage-earning power of the workman, but may do so in the future. All these considerations strengthen me in the view that the meaning of the phrase "the incapacity is permanent" is not that the physical injury is permanent, but that in all reasonable probability the weekly payments to which the man is entitled will never alter. And I would point out that it follows from this reasoning that there is no ground for treating the actuarial commutation as fixing a maximum sum for redemption beyond which no award can go. If the case comes under the latter portion of the section, it is open to the arbitrator to award a larger amount than 75 per cent. of the actuarial value of the then existing weekly payment, if he comes to the conclusion that in the future the weekly payment will probably be increased.

In the present case the learned county court judge has not directed his mind to the question whether the present weekly payment would probably be increased or diminished in the future. He has taken the fact that the injury is permanent as a fact sufficient to make it his duty to proceed under the first part of the section. In this I think he was wrong. Such a fact is not conclusive on the issue whether the incapacity is permanent. For example, it may well be that the amount was fixed at a time

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when the immediate effect of the injury on the wages earned was greater than that which will be its permanent effect. It is necessary that the judge should first decide, upon proper evidence or admissions, whether or not the incapacity is permanent; and then only is he in a position to decide what should be the method of arriving at the sum at which the weekly payments may be redeemed. This must not, however, be confounded with an inquiry whether the weekly payment should be presently reviewed. He must, I conceive, accept the existing weekly payment as correct *rebus sic stantibus*.

A complication arises in this case by reason of the fact that the workman has ceased to be in employment and is setting up in business for himself; and we have been referred to the case of *Norman & Burt v. Walder* (1) as an authority that in such a case the earnings in a business may be taken into consideration in fixing the amount of compensation. The decision in that case is, of course, binding upon me, and I do not wish to express any dissent from it; but at the same time I do not understand it to mean that you can, in all cases, take the actual profits of a business which an ex-workman has set up as "earnings" for the purpose of calculating compensation. It would be most unfair so to do as a general rule; and the unfairness might tell against the workman or against the employer according to the circumstances of the case. The workman might be employing capital of his own in the business, the profits of which the employer ought not to be able to appeal to in reduction of compensation for incapacity; and, on the other hand, the business might be unsuccessful, and the profits might inadequately represent the earning power of the workman as a workman. I am inclined to think that the phrase in paragraph 3 "the average weekly amount which he is earning or is able to earn in some suitable business after the accident" means in such a case the value of the work which the workman is doing in his own business; that is to say, the wages that he would have to give to a suitable man for performing the services therein which he himself is performing. But the point is not now before us, and I give no decision upon it.

(1) [1904] 2 K. B. 27.

I wish to add a word with regard to the amount of the compensation to which the provisions of the section lead. In more than one case reference has been made to the largeness of the compensation provided by this clause as contrasted with what a jury would be likely to give in an action for damages. I do not think that the provisions of the clause are open to objection on this ground. In giving a weekly sum to a workman as compensation the Act gives in effect the fair commutation value of that weekly sum. When this commutation value is ascertained, it may seem large when looked at as a lump sum, but it is no greater than the right to the weekly payment for life; and therefore it seems to me quite unjustifiable to criticize the commutation provisions in the way to which I have referred. Take, for instance, the case where the incapacity is permanent. So far from adding anything to the compensation which is given in the way of weekly payments, the clause prescribes that the sum to be given is one-fourth less than the actuarial value of the weekly payments to which the workman is already entitled. The comparison of the sum to be arrived at under clause 17 of the Second Schedule with that which a jury would give by way of damages is to my mind wholly illegitimate. The judge, in hearing an application under this clause, is not determining the compensation to be given to the workman for the accident. He is merely putting in another form the compensation which the Act has already given him; and he has to consider only the amount of the weekly payments, their probable duration, the probability of their being diminished or raised in the future, and the probable extent of such variation, if any. It is quite illegitimate for the judge to allow himself to be guided by what he thinks a jury would grant as damages; and equally illegitimate to take into consideration the amount which has already been paid to the workman in the past by way of weekly payments.

It follows, therefore, that this case must go back to the county court for the judge to reconsider his award. In my opinion he has not rightly appreciated the meaning of the clause, and has not determined whether the incapacity is permanent, but has assumed without inquiry that it is so because the injury is permanent.

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FARWELL L.J. This appeal depends on the construction of paragraph 17 of Sched. I. of the Workmen's Compensation Act, 1906. This paragraph gives the employer a right to apply to redeem any weekly payment awarded and continued for not less than six months for a lump sum, (1.) if the incapacity is permanent, of 75 per cent. of the purchase price named in the paragraph, and (2.) in any other case to be settled by arbitration under the Act. Unless the redemption is by agreement under the proviso to this paragraph, there must be an application to the county court, and the first question to be determined by the judge is one of fact—is the incapacity permanent or not? The employer is the only person who can apply, and it is for him to state to the Court the basis on which he applies; but the onus of proving permanent incapacity is on the person alleging it, because the form of the paragraph makes permanent incapacity an exception from the general class: it is as if the words had been "in all cases except that of permanent incapacity, arbitration, and in permanent incapacity cases 75 per cent." Now I think it is clear that the incapacity may be permanent although it is only partial: the extent of such incapacity is quite distinct from its duration, as is apparent from Sched. I., s. 1, sub-s. 1 (b), which provides that "where total or partial incapacity for work results from the injury a weekly payment during the incapacity" shall be made, and this is in accordance with the Scotch case of *National Telephone Co. v. Smith*. (1)

Next I am of opinion that the incapacity meant is that for which the Act provides, namely, incapacity to earn full wages. The Act does not give compensation for, e.g., the loss of a limb, but for the loss of earning capacity actually caused by the loss of such limb during the continuance of such incapacity: the loss of the limb doubtless diminishes the capacity to earn, but the Court has to measure the compensation by loss of earnings. If, therefore, the workman has learned as a one-armed man to earn, and earns, as high or higher wages than he got as a man with both arms, he cannot thenceforward get compensation, for there is no loss; but it by no means follows that this renders his capacity permanent, any more than his present failure to

(1) 46 Sc. L. R. 988.

earn full wages makes his incapacity permanent. In the one case his sphere of employment may fail, and he may be relegated to the great army of the unemployed as a one-armed man, and therefore as one less capable of wage-earning; in the other he may, after the award, earn full wages again. In considering, therefore, the question of fact whether the incapacity is permanent, the judge must consider all the circumstances of the case with proper evidence. If the man has been paralysed beyond hope of recovery, it may well be that the incapacity is permanent, but in any other case it appears to me to be very difficult to say with certainty that this is the case. If the workman had recovered so far that the compensation was reduced to a penny, it would be hard on him, so long as the possibility of recurrence of the incapacity continues, to allow the employer to redeem him on the penny basis. The judge might well say that he had reduced the payment to a penny instead of ending it, because it was not clear that the incapacity had ceased, but that it was equally impossible to say that it was permanent, and that the redemption therefore must be under the second alternative in the paragraph. So in the case before us, it may be that the judge will be unable to find that the incapacity is permanent. It is admitted to be a partial incapacity now subsisting, but that is neither admission nor evidence that any or all of such partial incapacity will continue either to a greater or less extent for all or any time, and it may well be that no evidence can be advanced which will satisfy the judge on the point. If that is so, the only redemption that can be given will be on the second alternative. Physical incapacity due to the loss of a limb is doubtless strong, and probably conclusive, evidence, in the absence of anything else, of incapacity to earn full wages on an application to award compensation, but on such an application no question of permanency arises. The award is simply during incapacity and is subject to the statutory right to review or terminate. It is not open to the judge on such an application to consider the probabilities of duration or to award a sum to be decreased or ended at a future day: *Baker v. Jewell*. (1)

(1) [1910] 2 K. B. 673.

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It follows from the reasons that I have stated that I am unable to agree with the learned county court judge's decision in this case. I doubt if he meant to find that the incapacity is permanent, but if he did, I am of opinion that there is no evidence on which he could do so. He has treated the inquiry before him in December and the award then made by him as though it were evidence of permanency, but it is evidence only of the extent of the incapacity in December and of the amount then awarded. Evidence of probable continuance was neither relevant nor admissible on that inquiry, and the learned judge misunderstood Lord Low's judgment in *National Telephone Co. v. Smith*. (1) Lord Low's view was in accordance with mine that evidence of permanency must be given and is adverse to treating antecedent awards as such evidence. The other two Scotch judges appear to have construed incapacity as meaning physical incapacity irrespective of earning power. For the reasons given above and with the greatest respect I am unable to agree with them.

I am therefore of opinion that the case must go back to the county court judge for settlement by arbitration under the latter part of the paragraph and in accordance with the Act, the basis being not damages but the value as on sale of the sum awarded, having regard to the circumstances of the case and the provisions of the Act, unless of course the county court judge is satisfied by evidence that the incapacity is permanent. It is plain that the commutation has been assessed by him on the principle which we held to be wrong in *Victor Mills, Ltd. v. Shackleton* (2), a case under the Act of 1897, before the same judge.

Appeal allowed and cross-appeal directed to stand over.

Solicitors: *Rhodes & Bethell Jones; Bristow & Co., for S. Baguley, Ashton-under-Lyne.*

(1) 46 Sc. L. R. 988.

(2) Ante, p. 22.

[IN THE KING'S BENCH DIVISION AND IN THE COURT
OF APPEAL.]

In re LUPTON.

Ex parte THE OFFICIAL RECEIVER.

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Bankruptcy—Retired Civil Servant—Pension—Lump Sum “by way of additional allowance”—Bankruptcy Act, 1883 (46 & 47 Vict. c. 51), ss. 44, 53—Superannuation Act, 1909 (9 Edw. 7, c. 10), ss. 1, 3, 8.

An undischarged bankrupt, who was in the Civil Service, on his retirement from the service was granted under the provisions of the Superannuation Act, 1909, a pension, and, “by way of additional allowance,” a lump sum in cash.

Held, that the whole of the lump sum did not vest in the trustee in bankruptcy for the benefit of the creditors, but was “compensation granted by the Treasury” within the meaning of s. 53 of the Bankruptcy Act, 1883, and must be dealt with in accordance with the provisions of that section.

APPEAL from a decision of Phillimore J.

The application upon which the order appealed from was made raised the question whether the whole of a lump sum in cash granted by the Treasury by way of additional allowance to a civil servant on his retirement vested in his trustee in bankruptcy under these circumstances.

In June, 1889, the debtor, who at that time was in the employment of the Post Office, was adjudicated a bankrupt. His liabilities were about 800*l.*, and he had no assets other than his pay as a civil servant. He was still an undischarged bankrupt, and no dividend had been paid to his creditors. On March 31, 1911, he retired from the Civil Service and, under the provisions of the Superannuation Act, 1909 (which he had adopted), was granted by the Treasury a pension of 105*l.* per annum and also a lump sum of 312*l.* 4*s.* by way of additional allowance.(1) This

(1) The Superannuation Act, 1909, s. 1, provides as follows :

“(1.) The proportion of the annual salary and emoluments on which the scale of the superannuation allowances to be granted to male civil servants is to be calculated shall, in

the case of civil servants who enter the service after the passing of this Act, be one eightieth instead of one sixtieth, and accordingly section two of the Superannuation Act, 1859, shall as respects such civil servants, have effect as if for the words ‘sixtieth’

C. A. lump sum had not been paid over by the Treasury to the debtor,
 1911 as they had received a notice from the official receiver claiming
 LUPTON, that the whole of it should be paid to him as the trustee in
In re. bankruptcy, and he moved for a declaration under s. 44 of the
 OFFICIAL Bankruptcy Act, 1883, that it was part of the property of the
 RECEIVER, bankrupt divisible amongst his creditors.
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1911. July 24. *Hansell*, for the official receiver. The question is whether this lump sum falls within s. 44 or s. 53 of the Bankruptcy Act. No part of the annual pension of 105*l.* is claimed, but it is submitted that the whole of this lump sum falls within s. 44. It is no part of the pension, and it is not within the meaning of "compensation" in s. 53, which refers to compensation paid for abolition or deprivation of office. It is purely a gratuity.

Tindale Davis, for the bankrupt. This additional allowance falls within s. 53, and the Court, in the exercise of its discretion, will consider all the circumstances and decide whether any and, if any, what part of it shall be paid to the trustee. It is also contrary to public policy to permit an allowance of this kind to be taken from the bankrupt to pay his debts. It is really a compensation or commutation allowance for part of his pension. He might have had a larger pension if he had not had the allowance. There is no definition of "pension" in the Superannuation Act, 1909, but in s. 2 of the Pensions Commutation Act, 1871 (34 & 35 Vict. c. 36), which is one of the Superannuation Acts, there is a definition of "pension" which is wide enough to include this additional allowance. Alternatively this lump sum

and 'sixtieths,' wherever they occur, there were substituted the words 'eightieth' and 'eightieths.'

"(2.) The Treasury may grant by way of additional allowance to any such civil servant who retires after having served for not less than two years, in addition to the superannuation allowance (if any) to which he may become entitled or the gratuity (if any) which may be granted to him under section six of the Superannua-

tion Act, 1859, a lump sum" to be calculated as therein mentioned.

Sect. 3 enables male civil servants who have entered the service before the date of the passing of the Act and who at that date are under sixty years of age to adopt the provisions of the Act.

Sect. 8 provides that the Act is to be read as one with the Superannuation Acts, 1834 to 1892.

is in the nature of a voluntary allowance that cannot be taken away from the bankrupt: *Ex parte Wicks*. (1)

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PHILLIMORE J. This is not an easy point, because the Superannuation Act, 1909, which has created this particular piece of property, is later than the Bankruptcy Act, 1883. But I think it comes to this. The old conditions as to pensions having been made less beneficial to civil servants, the Treasury is empowered to grant, in addition to the pension, a lump sum. It is not an optional sum in the sense that the Treasury can make the sum larger or smaller, but it is optional in the sense that they can decide whether to grant it or not. If they make the gift, it must be of a certain amount, as I read the section. But it is a gift, and it is not a gift on condition that the bankrupt should do something. It is not given to retain his services, and it is not a periodical gift. On the contrary, the periodical gift or pension, which is to keep the bankrupt absolutely alive, is a separate matter. I think it is just the same as if anybody else had given the bankrupt a lump sum of money. In the present case the bankrupt being undischarged, his trustee is entitled to have the whole of it, and the order must go accordingly.

H. L. F.

Against this decision the bankrupt appealed.

Oct. 27; Nov. 3. *Tindale Davis*, for the appellant. The learned judge in the Court below has held that the whole of the lump sum granted to the bankrupt "by way of additional allowance" vested in the trustee in bankruptcy under s. 44 of the Bankruptcy Act, 1883, for the benefit of the creditors. The bankrupt submits that the matter is governed by s. 53 of the Bankruptcy Act and must be dealt with in accordance with the provisions of that section.

The first point is that the bankrupt is entitled to this lump sum as part of his pension. The question arises under the Superannuation Act, 1909, but for the construction of that Act it is important to consider the provisions of the Superannuation Act, 1859 (22 Vict. c. 26). The word "allowance" as used in ss. 2 and 4 of that Act shews that this lump

C. A. sum is a payment to the civil servant as of right; and
 1911 s. 8 shews how the civil servant becomes entitled to the
 LUPTON, superannuation allowance. As soon as the certificate mentioned
In re. in that section is given he is entitled as of right. The later Act
 OFFICIAL of 1909 incorporates all the provisions of the earlier Act: s. 8.
 RECEIVER, The lump sum is part of the superannuation allowance.
Ex parte. Sect. 1 of the Act of 1909 only alters the method of computing
 the pension. Instead of calculating it on the footing of
 one-sixtieth it is to be calculated as one-eightieth plus the
 additional allowance.

[COZENS-HARDY M.R. The question really turns on s. 53,
 sub-s. 2, of the Bankruptcy Act, 1883.]

The effect of the corresponding sections in the Act of 1869
 (32 & 33 Vict. c. 71) was discussed in *In re Huggins*. (1) The
 argument there was that the pension was not "property" at all
 within s. 15 of the Act of 1869, which corresponds with s. 44 of
 the Act of 1883, and Jessel M.R. there said (2): "My view of
 the meaning of the provisions of the Bankruptcy Act is this.
 Sects. 15 and 17 vest all the 'property' of the bankrupt in the
 trustee, but this vesting is subject to exceptions such as that
 which is made by s. 23 of leases and onerous contracts which
 the trustee is authorized to disclaim. The 'property' vests
 by virtue of ss. 15 and 17, but subject to the exceptions made
 by subsequent sections of the Act."

[FLETCHER MOULTON L.J. I do not think that will be disputed.
Sir John Simon, S.-G. No.]

It was not the intention of the Legislature to put a new
 civil servant in a worse position than a servant under the Act
 of 1859. The Act of 1909 only provides a new method of
 calculating the pension. When once it has been certified that
 the civil servant is entitled to the lump sum, that lump sum
 is just as much pension as the remainder of it. Pension is
 only deferred pay, and the civil servant is just as much
 entitled to it as he is to his salary.

Further, it is submitted that this lump sum is "compensation
 granted by the Treasury" within s. 53, sub-s. 2, of the
 Bankruptcy Act, 1883.

(1) (1882) 21 Ch. D. 85.

(2) *Ibid.* at p. 91.

Sir John Simon, S.-G., and Hansell, for the respondent, were only called upon to argue as to the second part of the appellant's contention.

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Before the passing of the Superannuation Act, 1909, the practice was to treat all civil servants as entitled to pension according to a fixed rule. The object of the new Act was to substitute an arrangement whereby a discretionary limit was established as to a part of the pension. Under the Bankruptcy Act, 1883, this sum of money is clearly "property" of the bankrupt within s. 44. Before s. 53 can apply to it sub-s. 2 requires that the bankrupt must be "entitled to any half-pay or pension, or to any compensation granted by the Treasury." It cannot be rightly said that the bankrupt is "entitled." Again this lump sum of money does not come within the category of words in the sub-section. It is not "compensation." That word as used in the Superannuation Acts is merely a word of art meaning compensation in respect of an abolished office, and does not include this case. It connotes a deprivation of something as in the case of a workman deprived by accident of his capacity of earning wages.

In this case the bankrupt has elected to receive the payment under the Act, therefore it cannot be said that there is any deprivation for which he is to be compensated. In s. 6 of the Act of 1909 "compensation" is contrasted with "additional allowance" in s. 1, sub-s. 2. There may be instances of a wider use of the word as in s. 30 of the Act of 1834 (4 & 5 Will. 4, c. 24).

[COZENS-HARDY M.R. referred to s. 18.]

No doubt the word is used in varying senses in the older Acts; it is therefore more satisfactory to construe the Act of 1909 by itself.

[FARWELL L.J. In s. 22 of the Act of 1834 "compensation" and "allowance" are treated as synonymous.]

The word is used somewhat loosely in the older Acts, but in the Act of 1909 this lump sum is called an "additional allowance," while "compensation" is used only in connection with the abolition of office.

No reply was called for.

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COZENS-HARDY M.R. This appeal raises an important question under s. 53 of the Bankruptcy Act, 1883, which the Treasury most properly desire to have construed. Having carefully considered the case, I have come to the conclusion that the judgment of Phillimore J. on this very difficult question is wrong.

The question really arises in consequence of something which has happened under the Superannuation Act, 1909, but I think possibly the best way of approaching it is to deal first with s. 53 of the Bankruptcy Act, 1883. Sect. 53 is a section which contemplates clearly persons engaged in the Civil Service of the Crown; that is expressly stated in sub-s. 1, which, I think, primarily contemplates the case of a continuing officer in the Civil Service. In sub-s. 2 the language is rather different. That, I think, deals primarily with the case of a person who is no longer actually engaged in the Civil Service. I will read the sub-section: "Where a bankrupt is in receipt of a salary or income other than as aforesaid"—that is other than his salary as a civil servant—"or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct." Now on the passing of the Bankruptcy Act what were the powers of the Treasury, and in what circumstances could compensation be granted by the Treasury to a retired civil servant? For that purpose, of course, we must look at the statutes then in force. The first one to which our attention has been called is the Act of 1834. I think it is impossible to read that Act without seeing that although the Treasury was empowered to grant compensation to a civil servant who lost his post by reason of the abolition of the office, or by reason of some rearrangement of the office which necessitated his retirement—although that was one case in which the Treasury was authorized to grant compensation, yet the Treasury was authorized to grant compensation quite apart from the loss or extinction of the office, but

simply in consideration of past services. For that purpose reference to ss. 18 and 30 may be regarded as conclusive. Sect. 18 is in two parts: "No compensation for any office abolished . . . shall be charged upon the incidents or any other fund of any such department; and no such compensation"—that is compensation for loss or for any office abolished—"nor any allowance or compensation in the nature of superannuation or retired allowance, or reward to any such person in respect of his having held any public office or employment, or having been engaged in any public service, shall be granted"—under certain conditions. So that s. 18 plainly draws a distinction between the two cases. The Treasury may grant a compensation for loss of office, and it may grant it as a reward for past services. And when you look at s. 30, which is still in force, it is: "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services." Now I ask myself this: Immediately after the passing of the Bankruptcy Act, if the Treasury had granted a lump sum to a retired civil servant for past services, would that, or would it not, have come within the express language of s. 53, sub-s. 2, of the Bankruptcy Act? Would that have been a compensation granted by the Treasury? In my opinion it is impossible for us to say that it would not.

Now I come to the Act under which the present question arises. It begins by stating that civil servants were entitled to an allowance at a certain rate which was one-sixtieth of their salary, and this Act alters it to one-eightieth. The scheme of the Act is this. It says that with regard to persons entering the Civil Service after the date of the Act instead of one-sixtieth shall be read one-eightieth, which was, of course, a diminution of the amount of pension or retiring allowance that they would get. Then sub-s. 2 says this: "The Treasury may grant by way of additional allowance to any such civil servant who retires after having served for not less than two years, in addition to the superannuation allowance (if any) to which he may become entitled, or the gratuity (if any) which may be granted to him under section 6 of the Superannuation Act, 1859, a lump sum

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1911 his office multiplied by the number of completed years he has
served, so, however, that the additional allowance shall in no
case exceed one and a half times the amount of such salary and
emoluments." That section applies only to what I may call
new civil servants, civil servants who entered the Civil Service
after the passing of the Act; but there is a provision in s. 3 under
which, subject to compliance with certain regulations then
existing, civil servants may apply to the Treasury to be allowed
to come in on the footing of new civil servants. Now, as a
question of construction of s. 1, sub-s. 2, I think it is plain that
there is a difference between the right to the one-eightieth
—that is something which he is said to be entitled to—
and the lump sum which the Treasury may grant. I think
it is impossible to say that a civil servant has the same claim
to the lump sum as he has to the one-eightieth. I treat this
case as a case in which there is no distinction between a new civil
servant and an old civil servant who has complied with the
regulations and has obtained from the Treasury a grant of a
lump sum. That is the case at present before us. The bankrupt
was made bankrupt some time ago. He is an undischarged
bankrupt. He applied under s. 3 for a lump sum, and a lump
sum was granted to him; and the question that arises is, Is that
lump sum simply property of the bankrupt vesting in the trustee
available solely for his creditors in the first instance, or is it
"compensation granted by the Treasury" within the meaning
of s. 53, sub-s. 2, of the Bankruptcy Act? In my opinion it is
"compensation granted by the Treasury" and falls within the
section just the same as the compensation granted by the Treasury
under the Act of 1834 would have done.

Then it is contended that we must look simply at s. 6 of
the Superannuation Act of 1909, and the only reference to
compensation to be found in the Act is the particular case of
compensation on the abolition or rearrangement of the office.
That seems to me to be a fallacy. That is the only particular
instance of compensation which is to be found in this Act of 1909,
but when you come to s. 8 you find that this Act is to be read
as one with the Superannuation Act of 1834 and the several

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intervening Acts. I think, therefore, that a case which plainly falls within the Act of 1834 is just as much compensation as the particular case of compensation which is found in s. 6 of the Act of 1909. In my opinion, therefore, the decision of the learned judge on this difficult point is not sound. The learned judge in his judgment says that it is a gift. Of course in the sense that the Treasury are under no obligation to give it I quite agree with that. Then he goes on to say "it is not a gift on condition that the bankrupt should do something. It is not given to retain his services, and it is not a periodical gift. On the contrary, the periodical gift or pension, which is to keep the bankrupt absolutely alive, is a separate matter. I think it is just the same as if anybody else had given the bankrupt a sum of money." With great respect to the learned judge I am unable to follow that. It seems to me, having regard to what has happened, that this is "compensation granted by the Treasury," and it seems to me to fall within the express language of s. 53 of the Bankruptcy Act, and, therefore, although it is undoubtedly "property of the bankrupt," it is property which has to be dealt with having regard to the provisions of s. 53.

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FLETCHER MOULTON L.J. I am of the same opinion and I fully agree with the judgment which has just been delivered. With regard to the first point I do not think it is capable of doubt that there is a distinction between sub-s. 1 and sub-s. 2 of the 1st section of the Superannuation Act, 1909. Whereas the civil servant is entitled, as of right, to the allowance under the one, the additional allowance under the other is given only if the Treasury think fit to give it; they cannot be compelled to give it. With regard to the main question I agree with the Master of the Rolls that we must start with the Bankruptcy Act, 1883, s. 53, sub-s. 2, and ascertain what is the true meaning of the word "compensation" in that Act. All civil servants hold their positions during the pleasure of the Crown, and usually when they reach the age of sixty-five the Crown exercises its rights in this respect and ceases to avail itself of their services, but in certain cases of distinguished service they are kept beyond the ordinary age, and, when they go, certain allowances are made,

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sometimes by way of annual payments, and sometimes by way of a lump sum. In sub-s. 2 of s. 53 of the Bankruptcy Act we find the words "salary, income, half-pay, pension or compensation." I think that collocation of words points to "compensation" in this section including lump sums paid to civil servants by the Treasury as well as annual payments. This is not contested by the Solicitor-General, whose argument I confess made a great impression on my mind at one time. His argument was that "compensation" is used in a strictly technical sense in all these Acts, and that it refers to cases not where a man is taken away from his office, but where his office is taken away from him—where, for instance, owing to some rearrangement or for some other purpose his office is suppressed. He called our attention to passages in the earlier Acts which clearly shew that "compensation" was there used as denoting a sum paid to persons who were deprived of their office in this way. One consequence is this—and the Solicitor-General accepted it—that it is clear that the compensation, which is protected to a certain extent by s. 53, sub-s. 2, of the Bankruptcy Act, may be a lump sum. But I have come to the conclusion that although "compensation" is always used in respect of payments to persons who have been deprived of their office in that way, it is also used in a broader sense. Sect. 18 of the Act of 1834, to which the Master of the Rolls has called attention, puts this beyond doubt. If, therefore, in an Act which was passed before the Bankruptcy Act the word is used in that broad sense, I feel myself free to interpret it so here, and I have come to the conclusion that it fairly covers all payments made in respect of the cessation of employment, whether they are in the shape of annual payments or whether they are in the shape of lump sums. For these reasons I am of opinion that this lump sum is the property of the bankrupt and is subject to the provisions of s. 53 of the Bankruptcy Act.

FARWELL L.J. I am of the same opinion, and I am glad to be so, because I think it would have been very unfortunate if we had had to hold that the word "compensation" has the strict meaning suggested by the Solicitor-General, with the result

that a man whose office has been abolished because presumably it was useless, and who may or may not have done good service, is protected, while a man who has done exceedingly good service in a continuing office and gets compensation for past services, is not protected. I agree, reading all these Acts together, that the word "compensation" in the Superannuation Act is used as equivalent to "allowance for past service"; and I agree also that in construing the Bankruptcy Act, 1883, by the light of the other Acts as they then stood, compensation undoubtedly included allowance for past service. It is not immaterial to observe that the payment which under sub-s. 2 of s. 1 of the Superannuation Act, 1909, the Treasury may grant, is by way of additional allowance, and the allowance to which it is added, although by a lump sum and not an annual payment, may reasonably be said to stand on the same footing.

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Appeal allowed.

Solicitors: *Lumley & Lumley; Solicitor to the Board of Trade.*

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Oct. 14, 19, 25.

Local Government—Street—Maintenance and Lighting—Dangerous Natural Ravine—Accident to Person using the Street—Liability of Local Authority—Misfeasance or Non-feasance—Negligent Exercise of Statutory Powers.

A street within the district of the defendants, a municipal corporation, was dedicated to the public by its owner. Across the end of the street was an unfenced natural ravine. In 1904 the defendants took over the street under the provisions of a private Act of Parliament similar to those contained in the Public Health Act, 1875, and paved and made it up and subsequently maintained it. They also lighted it under their statutory powers, which authorized them to do such acts as they should think necessary for lighting their district. In 1910 a motor car containing the plaintiff while being driven along the street at night fell over the ravine in consequence, it was alleged, of the ravine being unfenced and the street being insufficiently lighted. In an action by the plaintiff to recover damages for injuries sustained the jury found that the street as made up and constructed was a danger to persons using it, that the unfenced ravine was a hidden trap, and that the defendants had not taken proper care to warn the public of the danger :—

Held, that the effect of the findings of the jury was that the defendants in taking over and making up the street and leaving it in a dangerous condition had been guilty of misfeasance, and also that they had acted negligently in the performance of their statutory duties with regard to maintaining and lighting the street, and that the plaintiff was, therefore, entitled to judgment.

FURTHER CONSIDERATION of an action tried by Lush J. and a special jury at Manchester Assizes.

The facts as stated by the learned judge in his judgment were as follows :

“This is an action brought by Mr. James McClelland against the corporation of Manchester to recover damages for alleged negligence and misfeasance on the part of the defendants in connection with the making up of a street in Manchester called Sunderland Street, and for alleged negligence in improperly leaving the street, which ended in a steep ravine or declivity, insufficiently lighted and fenced. The damages in the event of the plaintiff recovering judgment were agreed at 250*l*.

“The action came on for trial before me at Manchester with a special jury. The jury answered certain questions that I left to

them in favour of the plaintiff, and the case then stood over for further consideration. Mr. Sutton, who appeared with Mr. Atkinson for the defendants, contended that notwithstanding the findings the defendants were not liable in law. At the close of the arguments I postponed delivering my judgment until I had considered the numerous authorities that were cited to me by the learned counsel on both sides. The facts were shortly as follows. The street in question, Sunderland Street, in one of the suburbs of Manchester, was dedicated to the public by the then owner about fourteen years ago. A few houses were built, the first in about 1897, but the street was not paved or kerbed or made up until the defendants made it up in 1904. No evidence was placed before the jury as to when it was first lighted, but it was admitted by Mr. Sutton that the particular lamps that were in the street at the time of the accident were placed there after the street was opened. The case was conducted at the trial as I understand upon the footing that the street was first lighted by the defendants about the time when they made it up, though Mr. Sutton on the last occasion that he was before me stated that it was lighted some time before. I do not think that the date is of any great importance in the case.

“Some time before August, 1904, the defendants, acting under the powers conferred upon them by their Improvement Act, 1851 (which are similar to those conferred on local authorities generally by the Public Health Act, 1875), served notices on the frontagers to make up the street. The defendants in serving this notice had to give directions as to the manner in which the work was to be done by the frontagers (s. 15), the way in which and the extent to which the street was to be made up being matters under the exclusive control of the defendants.

“The frontagers not carrying out the work the defendants did it themselves. It was carried out in the following way. The street was paved, kerbed, and sewered, and side footpaths made. As originally laid out it led up to the brink of a deep and precipitous ravine. The ravine had never been fenced. Before the street was made up by the defendants it was used to some extent by persons having occasion to go to and from the houses, but not being made up or completed as a street there would not

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presumably be any serious risk, as it was obviously not a street frequented to any extent by the public. The defendants paved and flagged and kerbed it, and generally made it up as a new street, almost close up to the brink of the ravine. They left a very small space on one side of the street not made up, a small triangular plot, which apparently was left as it was owing to its declivity towards the ravine. They lighted it by means of ordinary gas lamps, at a considerable distance apart, the last lamp in the street being placed near to the edge of the ravine. Across the ravine and in the same line and on the same level as Sunderland Street was another street called Windsor Road, also under the defendants' control. There was a lamp in that road approximately the same distance from the nearest lamp in Sunderland Street as that lamp was from the next lamp farther up Sunderland street. There was evidence that the effect of this system of lighting to any one passing down Sunderland Street was that that street and Windsor Road appeared to be one continuous lighted street, and there was nothing to indicate that the two streets were separated by a ravine. The Windsor Road lamp, however, was not there until some time, about two years, after the road was made up. The defendants had been warned by their own officials several times before the accident to the plaintiff (the facts as to which I will state in a moment) that the street was dangerous owing to the unfenced ravine. Reports with regard to it and as to the steps that ought to be taken for the safety of the public were made to the corporation, but nothing was done either by way of fencing or additional lighting or otherwise.

"One evening in December, 1910, while an election was pending, the plaintiff was being driven down Sunderland Street in a motor car at a moderate pace—eight miles an hour one of the witnesses said—to fetch a voter to take him to the poll. It was a dark night. Neither the plaintiff nor the driver of the car knew the road or knew of the existence of the ravine, and while proceeding lawfully along Sunderland Street (the jury negatived contributory negligence, which was not seriously pressed) the driver having no warning either by the sufficient lighting or otherwise of the danger drove over the brink, and the car fell

down the ravine and fell over, the plaintiff suffering serious injuries through the fall.

"There was some conflict of evidence as to the insufficiency of the light near the edge of the ravine. The driver of the car said he thought that the lamp at the end of the street was lighted, but said that the light was insufficient to indicate the existence of the ravine. A witness Ley, called afterwards, said that the mantle of the lamp had been broken and left unrepaired for a week or so before the accident, so that on the night in question the lamp gave practically no light at all. He also stated, however, that even when it was lit a man driving a quick vehicle like a motor car could not see the ravine in time to pull up. The place he said was 'a death trap.' The defendants' witnesses on the other hand, dealing with the adequacy of the light generally, said that the lighting was efficient and adequate. They admitted that if the lamp by the ravine was not lit it would in fact be dangerous to drive down the road on the night in question. No evidence was called for the defendants as to the state of the lamp.

"At the close of the evidence I left the following questions to the jury. I append the answers to the questions.

"1. Was the road as made up and constructed a danger to persons lawfully using it?—Yes.

"2. Was the ravine which was unfenced a hidden trap to persons using the road?—Yes.

"3. Did the defendants in opening the road to the public after making it up and in maintaining it take all proper care to warn the public of the existence of the danger?—No.

"4. Were the public invited by what the defendants had done to pass along the whole of the road as being a proper highway?—Yes.

"5. Were the plaintiff and/or the driver of the car guilty of contributory negligence?—No."

E. Sutton and *C. Atkinson*, for the defendants. In spite of the findings of the jury the defendants are entitled to judgment. The cause of the accident to the plaintiff is found by the jury to be, in substance, the omission of the defendants to fence the ravine or to provide sufficient light to warn users of Sunderland

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Street of its existence. It may be conceded that the ravine constituted a danger and a nuisance, but the defendants are not responsible for its creation, and whatever may have been the duties which the defendants undertook with regard to Sunderland Street, the omissions complained of amount to non-feasance only and not to misfeasance, and the defendants are not liable for non-feasance: *Cowley v. Newmarket Local Board*. (1) But the defendants have not in fact omitted to perform any duty for which they were responsible. The owner of land dedicated as a highway is under no obligation to protect members of the public using that highway from a dangerous natural ravine at the side of or across the highway, and if a local authority takes over the highway and under statutory powers makes it up and lights it, the local authority is under no greater obligation with regard to protecting the public from the ravine than was the landowner: *Maguire v. Liverpool Corporation*. (2) As regards the paving and making up of Sunderland Street the defendants' only duty was to use ordinary care, and no breach of that duty has been found by the jury: *Canadian Pacific Ry. Co. v. Roy* (3); *Municipal Council of Sydney v. Bourke* (4); *Glossop v. Heston and Isleworth Local Board*. (5) The passage from the speech of Lord Halsbury in *Shoreditch Corporation v. Bull* (6) cited by Vaughan Williams L.J. in *Dawson v. Bingley Urban Council* (7) shews that in order to make the defendants liable they must in making up this street have done something which was an alteration of its normal condition; and an example of what Lord Halsbury was referring to is to be found in *Hurst v. Taylor* (8), where a local authority having diverted a footpath was held liable for not taking steps to protect the public from a danger created by the diversion; but by paving and making up this street the defendants have not altered its previous character in relation to the ravine. Before the defendants took over the street the only right of the public was to use it in its then condition, i.e., subject to the danger of the unfenced ravine. The fact that the defendants

(1) [1892] A. C. 345.

(2) [1905] 1 K. B. 767, at p. 787.

(3) [1902] A. C. 220.

(4) [1895] A. C. 433.

(5) (1879) 12 Ch. D. 102.

(6) (1904) 90 L. T. 210.

(7) [1911] 2 K. B. 149.

(8) (1885) 14 Q. B. D. 918.

took over and paved the street cannot confer upon the public the right to have the user of the street in a different and non-dangerous condition. There was no duty on the defendants to fence the ravine. Under ss. 30 and 31 of the Public Health Act, 1907 (which did not come into force in Manchester until 1910), local authorities are empowered to require dangerous places adjoining streets to be enclosed or fenced; but the exercise of those powers is optional, and the omission to put in force optional powers does not give rise to a cause of action: *Wilson v. Halifax Corporation* (1); *Cornwell v. Metropolitan Commissioners of Sewers*. (2) The jury have found that the defendants did not take proper care to warn the public of the extent of the danger; apart from the question of fencing the ravine, this answer must be based on an alleged failure of the defendants to light the spot sufficiently. No other duty to warn can be suggested. Under the Manchester General Improvement Act, 1851 (14 & 15 Vict. c. cxix.), ss. 6 and 7, the Gasworks Clauses Act, 1847, s. 13, and the Gasworks Clauses Act, 1871, s. 24, the defendants have power to do all such acts "as they shall think necessary for lighting the borough and the neighbourhood thereof." There is no finding of the jury that their statutory duty in this respect has not been properly discharged, and, therefore, if the accident to the plaintiff resulted from this particular street not being sufficiently lighted, that fact does not make the defendants liable: *Young v. Vestry of St. Mary's, Islington* (3); *Goldberg v. Liverpool Corporation* (4); *Harris v. Baker*. (5) If the system of lighting was adequate when installed, but had become inefficient at the date of the accident, that is merely non-feasance. The doctrine of the liability of a public authority for misfeasance only as distinguished from non-feasance applies to all the statutory duties of the authority and is not confined to their duties as highway authority. It is suggested that the effect of the light in Sunderland Street when seen in connection with the lamp in Windsor Road was to constitute a trap; but the lighting was done under statutory authority, and

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(1) (1868) L. R. 3 Ex. 114.

(3) (1896) 60 J. P. 821.

(2) (1855) 10 Ex. 771.

(4) (1900) 82 L. T. 362.

(5) (1815) 4 M. & S. 27.

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if the defendants in the bona fide exercise of the discretion which the Legislature has conferred upon them install a particular arrangement of lights, they are not liable even though that particular arrangement does create a danger. Damage resulting from the bona fide exercise of statutory powers is not actionable: *Rex v. Pease* (1); *Hammersmith and City Ry. Co. v. Brand* (2); *London, Brighton and South Coast Ry. Co. v. Truman*. (3) The defendants are the sole judges of whether in carrying out their statutory duties they have exercised reasonable care. With regard to the fourth question to the jury, there was no evidence of any invitation by the defendants to use the street or of any representation that it was safe to do so.

[The following cases were also cited:—*Thompson v. Mayor of Brighton* (4); *Gilbert v. Corporation of Trinity House* (5); *Whyler v. Bingham Rural Council*. (6)]

Langdon, K.C., and *Gordon Hewart*, for the plaintiff. The principle of law applicable to this case is that laid down by Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (7) to the effect that an action will lie for doing that which the Legislature has authorized if it be done negligently and damage is caused. *Mersey Docks Trustees v. Gibbs* (8) and *Gilbert v. Corporation of Trinity House* (5) are illustrations of the application of that principle. It is not disputed that if the Legislature has authorized a particular act to be done in a particular way, and the result of doing the act in that particular way is to cause injury to a member of the public, there is no cause of action, and the remedy, if any, must be found in the statute authorizing the act. *Rex v. Pease* (1) and *London, Brighton and South Coast Ry. Co. v. Truman* (3) are instances of that class of case, but they have no application to the present case. The distinction, as was pointed out in *Vaughan v. Taff Vale Ry. Co.* (9) and *Jones v. Festiniog Ry. Co.* (10), is that where no particular way of doing the act authorized by statute is specified it must be done in a reasonable

(1) (1832) 4 B. & Ad. 30.

(6) [1901] 1 K. B. 45.

(2) (1869) L. R. 4 H. L. 171.

(7) (1878) 3 App. Cas. 430, at p. 455.

(3) (1885) 11 App. Cas. 45.

(4) [1894] 1 Q. B. 332.

(8) (1866) L. R. 1 H. L. 93.

(5) (1886) 17 Q. B. D. 795.

(9) (1860) 5 H. & N. 679.

(10) (1868) L. R. 3 Q. B. 733.

way. The answers of the jury to the first and third questions cover this point and mean that there was a lack of reasonable care on the part of the defendants in the exercise of their statutory duties with regard to the construction, maintenance, and lighting of the street. *Whyler v. Bingham Rural Council* (1) is an authority shewing that the jury were properly asked the first question. The answer to the second question involves the position that the defendants were negligent. In so far as this case depends on the defendants' duties as highway authority this case cannot be distinguished from *Shoreditch Corporation v. Bull* (2) and *Hurst v. Taylor*. (3) By making up the street the defendants have altered its condition, for by increasing the facilities for user they have increased the danger. With regard to the question of lighting, the defendants undertook the duty of lighting a dangerous road and they have failed to carry out that duty in a reasonable and proper manner, and they are therefore liable to the plaintiff: *Lamley v. Mayor of East Retford*. (4)

Dawson v. Bingley Urban Council (5) is the only case in which it has ever been suggested that the doctrine of non-feasance applies to anything but the repair of a highway, and it was not necessary for the purposes of that case to decide that point, and Farwell L.J. doubted it. The jury in considering whether the defendants had carried out their duty as to lighting the street in a proper and reasonable manner were also entitled to take into consideration the evidence of the dangerous trap produced by the relative positions of the lamps in Sunderland Street and Windsor Road and also the evidence that one of the lamps was defective on the night in question. *Young v. Vestry of St. Mary's, Islington* (6) and *Goldberg v. Liverpool Corporation* (7), which were relied on for the defendants on this point, are distinguishable on the ground that in both those cases the particular act or omission complained of was expressly authorized by statute. The plaintiff does not rely on the answer to the fourth question.

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(1) [1901] 1 K. B. 45.

(4) (1891) 55 J. P. 133.

(2) 90 L. T. 210.

(5) [1911] 2 K. B. 149.

(3) 14 Q. B. D. 918.

(6) 60 J. P. 821.

(7) 82 L. T. 362.

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Sutton, in reply, cited *Robinson v. Workington Corporation* (1)
and *Mellor v. Mayor of Heywood*. (2)

Cur. adv. vult.

1911. Oct. 25. LUSH J. read the following judgment, in which, after stating the facts and the findings of the jury as set out above, he continued as follows: I wish to say a word with regard to the questions and the answers of the jury.

Mr. Atkinson contended that no question had been left to the jury as to the defendants having been guilty of negligence in making up and opening the street. I do not agree with this view. In the first place, I think that the third question covered this. I asked the jury to say whether in the two things that the defendants did—opening the street and maintaining it—they took all proper care. The answer of the jury negatived this in my opinion as to each of the two acts. But in any case, as it was not disputed, and it was indeed obvious, that the defendants knew of the existence of the ravine, their leaving the road with a trap in it known to them and hidden from persons using the road at night was necessarily in itself an actionable wrong and a breach of their duty to take reasonable care, assuming that such a duty existed. The second observation I wish to make is this. I had some doubt at the time whether the fourth question was a relevant or proper question to leave. The defendants, as Mr. Sutton pointed out, do not invite the public to use a street in the sense in which the owner of premises invites persons to use them, and it is in that connection that the expression generally occurs in these cases, and the answer to that question does not appear to me to carry the case any further. Mr. Langdon, however, did not rely on this answer, except as illustrating the difference between the road as originally made and the street as made up and completed by the defendants, and I do not attach any real importance to the answer in coming to the conclusion at which I have arrived.

Mr. Sutton raised several contentions in support of his argument that the defendants were entitled to judgment. The first point with which I propose to deal was this. It was said that

(1) [1897] 1 Q. B. 619.

(2) (1884) 48 J. P. 148.

whatever duty the defendants might be under they did not create the nuisance, namely, the unfenced ravine, and that what in fact caused this accident was an omission by the defendants to fence or to light or to warn, or whatever it may be, that this was non-feasance and not misfeasance, and that consequently the defendants were not liable. This in my opinion involves a misconception as to what is meant in law by non-feasance.

The meaning of non-feasance in this connection and the reason why a highway authority are not liable for non-feasance have so often been explained that it is not necessary to go in any detail into it. A surveyor of highways not being liable at common law for merely suffering a highway to be out of repair, it was held that when the Legislature imposed the burden of repairing highways on a local authority the latter were not liable for the breach of what had now become a statutory duty, because there was nothing in the statute to indicate that a new liability was intended to be created. If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work done safe instead of dangerous.

You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all.

It appears to me that the decision of the House of Lords in

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1911 *Shoreditch Corporation v. Bull* (1) and the principles enunciated by Lord Halsbury in that case dispose of this part of the argument. In that case Lord Halsbury said: "I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor of highways, may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of non-feasance in several of the cases in which the proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to shew that the act which was being done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible." The case of *Dawson v. Bingley Urban Council* (2) is to the same effect. The normal condition of the road was altered, and altered by the defendants, and if there was any breach of duty it amounted to misfeasance and not non-feasance.

The next question to be considered is a more difficult and serious one. It was contended that the defendants were under no duty to make up the street otherwise than they did or to take any steps to protect the public against the hidden danger. It was said that as the road had been dedicated to the public in the same condition in which it was at the time of the accident, namely, with an open ravine at one end, the public had to take

(1) 90 L. T. 210.

(2) [1911] 2 K. B. 149.

the road as it was, and that as the previous owner could not have been sued if one of the public strayed over the road and fell into the ravine, neither could the defendants, who did nothing more than improve the then existing highway. It was further said that as the Legislature had authorized the paving, &c., of the whole of the highway, or such part as the defendants thought fit to pave, they were protected even if the road was a nuisance, and in support of this view the case of *London, Brighton and South Coast Ry. Co. v. Truman* (1) and similar cases were cited. In my opinion these contentions are not well founded.

It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made up street, they must, in my opinion, exercise due care and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertakes and performs a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which if carelessly done may cause injury to others: *Gilbert v. Corporation of Trinity House*. (2)

Moreover, if statutory powers can be exercised reasonably so as not to injure other persons, to exercise them unreasonably and thereby cause an avoidable injury is in itself negligence. "It is now thoroughly well established," said Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (3), "that no action will lie for doing that which the Legislature has authorized if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law,

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(1) 11 App. Cas. 45.

(2) 17 Q. B. D. at p. 799.

(3) 3 App. Cas. at p. 455.

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the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." Thus where a highway authority diverted a public highway and omitted to protect those who might use it against straying into the old highway and being injured, it was held in *Hurst v. Taylor* (1) that they were liable for breach of duty to take reasonable care. Subject to one qualification it is always a question of fact for a jury, assuming, of course, that there is sufficient evidence to be left to them, whether a local authority in exercising statutory powers has exercised them reasonably—that is, with due regard to the safety of those who will be affected by that exercise. The one qualification is this: If it can be shewn that the Legislature authorized the particular act to be done in the way in which it was done, no question can arise as to the exercise of the powers being reasonable.

The statutory authority to do the very act which has caused the damage is, of course, an answer to an action. In such a case there would be *damnum sine injuria*, and Mr. Sutton sought to bring the present case within that principle. He has failed in my opinion to do so. In all the cases in which it has been held that the damage suffered by the exercise of the statutory powers could not be made the subject of an action it will be found that the reason was that on the true construction of the statute the particular act done in that particular way was expressly authorized. Thus in *London, Brighton and South Coast Ry. Co. v. Truman* (2) it was held that the Legislature had on the true construction of the Act authorized the railway company to select any site they pleased for the erection of the cattle pens that caused the nuisance. It was therefore held that the fact that they could have erected them in a different place and so have avoided the nuisance did not affect their liability.

Mr. Langdon was quite right, in my opinion, when he said that whether or not the Legislature has authorized the work as done so as to exclude the consideration whether the powers have been reasonably exercised is a question depending upon the construction of the statute. It is clear it cannot be said

(1) 14 Q. B. D. 918.

(2) 11 App. Cas. 45.

on the construction of the defendants' Improvement Act, under which their powers were exercised, that the Legislature expressly authorized this road to be made as it was up to the brink of an unfenced ravine. They had general powers, permissive, not imperative, to make up any street within their district in the way they thought fit, and they were bound, as it seems to me, to act reasonably in the exercise of those powers. It was a question, therefore, for the jury whether they did act reasonably and took proper care in exercising their powers under the special circumstances of the case. I have already said that the jury have, in my opinion, negatived the contention that they did, and the fact that they knowingly made up the street in such a way as to expose passers-by to a hidden trap seems to me of itself conclusively to shew that they did not. They could have made up the street, as was pointed out by Mr. Langdon, leaving a sufficient space between the street and the ravine to enable a driver of a vehicle, motor or otherwise, to stop before he came to the ravine. The defendants left so small a space that that was impossible. Posts could have been placed in the part not made up and an efficient system of lighting could have been adopted which would have made it clear that the road came to an end. It is true, and this was conceded, that the defendants had no power at the time they made up the road to fence off the ravine at the expense of the frontagers. They acquired these powers later by an Act that was passed in 1907 and came into operation in 1910, but this, in my opinion, is immaterial.

The defendants, therefore, having exercised their powers, as the jury thought, negligently in such a way as to leave a hidden trap for persons who went along that road at night, exposing them to unnecessary and avoidable danger, are liable to the plaintiff, who suffered damage by reason of this negligence.

There are two matters that I must mention before passing on to consider another way in which Mr. Langdon put his case.

I have pointed out that the plaintiff's witnesses did not agree as to whether the lamp at the edge of the ravine was lighted, and it may be said that it is consistent with the evidence and with the findings that an adequate system of lighting was

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provided and that all that could be complained of was that the lamp was not properly lit on that particular night. It seems to me to be clear that by their third finding the jury, in effect, found that the defendants adopted an inadequate and improper method of protecting the public. The reports that were made as to the dangerous condition of the street had reference to that, and not to the accidental breaking of the lamp, and I cannot doubt that the jury so intended to find.

The other observation is this. The light in Windsor Road was, as I have said, put up after the street was made up, namely, in 1906. That cannot therefore affect the question of liability for what was done when the street was made up and opened in 1904. It may have some bearing on the other view which was presented by Mr. Langdon, with which I will now deal. But the ground on which I have come to the conclusion that there was an unreasonable exercise of the defendants' powers in 1904 is, of course, independent of this incident in the case.

The other ground on which Mr. Langdon contended that the plaintiff was entitled to judgment was this. He said that apart from the misfeasance in 1904, and assuming there was none, yet the defendants were liable for improperly and insufficiently lighting the street at the time of the accident, and that this was also covered by the third finding. For this purpose it is immaterial whether the lamp was lit but was insufficient to warn the plaintiff or his driver of the existence of the ravine, or whether it would have been sufficient if lit and the accident was due to the defendants' servants not taking proper care to see that it was lit. Mr. Sutton contended that the defendants were not liable for any such neglect, on the ground that they were under no duty to light, and that if they were it was only non-feasance and not misfeasance.

In support of the first of these contentions he cited the case of *Young v. Vestry of St. Mary's, Islington*. (1) In that case the Divisional Court, affirming the county court judge, held that as a statute (Metropolis Management Act, 1855, s. 130) which enacted that the defendants should light the streets within their district "well and sufficiently" gave them a discretion to continue to light

(1) 60 J. P. 821.

"at and during such times" as such authority "may think fit," they could not be sued for an accident caused by their having turned out the lights at an hour which they thought reasonable. The Court, as I gather, held that they only did what they were expressly authorized to do. There was, of course, no such express authority in the present case. Other cases were cited as shewing that when there was no duty to light and the defendants did not undertake to light a street they could not be held liable for a consequent accident.

Mr. Langdon contended that if the defendants undertook to light and did light a street which they knew to be dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cited the case of *Lamley v. Mayor of East Retford* (1) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground.

With regard to the contention that this was non-feasance, the answer seems to me to be this. In the first place, I do not think that the doctrine applies to the performance of such a duty as this. It has nothing to do with the non-repair of a highway. There are many public duties, no doubt, for the non-performance of which a plaintiff cannot sue because he loses the benefit of what would have been done if the duty had been performed, as, for instance, the obligation to provide a system of sewerage for the benefit of a district, as in *Glossop v. Heston and Isleworth Local Board* (2); but if a duty is undertaken and improperly performed, and actual damage is occasioned thereby, the person injured has, as I have already stated, a perfectly good cause of action. The Court of Appeal obviously took that view in the case of *Lamley v. Mayor of East Retford* (1), to which I have referred. The case of *Mersey Docks Trustees v. Gibbs* (3) is another illustration of a similar principle. For this purpose the light in Windsor Road is perhaps not without importance. It was an additional circumstance calling for additional care in the proper lighting of Sunderland Street.

(1) 55 J. P. 133.

(2) 12 Ch. D. 102.

(3) L. R. 1 H. L. 93.

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There was one defence which is raised on the pleadings, and was just mentioned by Mr. Sutton in his argument, namely, the Public Authorities Protection Act, 1893. That clearly affords no answer to the claim based upon the second ground to which I have just alluded, nor does it, in my opinion, afford an answer to the claim upon the other ground. It is true that the "act or neglect" was in one sense complete more than six months before the writ, but the real question is "when did the cause of action arise": see the judgment of Bigham J. in *Markey v. Tolworth Joint Isolation Hospital District Board*. (1)

On both the grounds I have mentioned, therefore, I think the plaintiff is entitled to succeed, and I give judgment for him for 250*l.*, the agreed damages, with costs, including, of course, the costs of the argument on further consideration.

Judgment for plaintiff.

Solicitors for plaintiff: *Ashworth & Inman, Manchester.*

Solicitor for defendants: *Hudson, Manchester.*

(1) [1900] 2 Q. B. 454, at p. 459.

F. O. R.

[IN THE COURT OF APPEAL.]

ECCLES & CO. v. LOUISVILLE AND NASHVILLE
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Practice—Evidence—Production of Documents—Action in Foreign Court—Order for Examination of Witness in this Country—Documents in Possession of Servant as such—Refusal to produce Documents by Servant—Attachment—Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), ss. 1, 3, 5.

Where an order had been made under the Foreign Tribunals Evidence Act, 1856, for the examination of a witness and the production of documents by him, and it was sought to attach him for refusing to produce material documents of which it appeared that he had possession, custody, or control only in the character of servant to a master, who was not a party to the proceedings with reference to which the order was made, or before the Court:—

Held (by Vaughan Williams L.J. and Buckley L.J., Kennedy L.J. dissenting), that an order for attachment of the witness ought not to be made, the Court not being satisfied that the production of the documents by the witness would not be in violation of his duty to his master, although he had not been expressly forbidden by his master to produce them, and had not asked and declined to ask for his master's permission to do so.

By Kennedy L.J. : The true inference from the circumstances of the case was that it would not have been any violation of the witness's duty to his master if he had produced the documents, and the mere fact that he had possession of them as a servant was no sufficient excuse for non-production of them, the master not having forbidden him to produce them, and he not having asked, and declining to ask, his master for leave to do so ; and therefore the writ of attachment ought to issue.

APPEAL from the order of a Divisional Court (Bray J. and Bankes J.) giving leave for the issue of a writ of attachment against one Colmar Nickels for contempt in refusing to produce certain documents, upon his examination in pursuance of an order for his examination and the production of documents by him under the Foreign Tribunals Evidence Act, 1856.

An action had been brought against the Louisville and Nashville Railroad Company in Alabama in the United States by Eccles & Co., who were cotton merchants at Liverpool, as holders of certain bills of lading issued in the name of an agent of the railroad company by a firm called Knight, Yancey & Co.,

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for non-delivery of bales of cotton specified in those bills of lading. It was alleged that Knight, Yancey & Co. had no direct authority from the defendants, the railroad company, to issue the bills of lading in question, but the plaintiffs, Eccles & Co., sought to shew that, by their conduct and course of business, the defendants had estopped themselves from denying that the bills of lading were issued by their authority. The bills of lading purported to be given in respect of cotton shipped on board ships belonging to, or employed by, the Serra and Tintore Steamship Company, a Spanish company, which ran a line of steamers between Liverpool and Cuba and the southern ports of the United States. A firm called Walter L. Nickels & Gordon Ross were the agents for the Serra and Tintore Steamship Company at Liverpool. The sole member of this firm was one Walter L. Nickels. The appellant Colmar Nickels was a salaried clerk in the employ of the firm. It appeared that W. L. Nickels was not in good health, and was often away from business, and that the appellant was the head clerk in the department of the firm's business to which the after-mentioned documents related. It was alleged by the plaintiffs that there were in the appellant's possession, custody, and control, in connection with the business of the firm of W. L. Nickels & Gordon Ross, correspondence and documents material to the question arising in the action, as tending to shew that by their conduct and course of business the defendants had estopped themselves from denying the authority of Knight, Yancey & Co. to issue the bills of lading. (1)

There had been an agreement between the parties to the action for the examination of witnesses in England for the purposes of the action. (2) One of the stipulations of this agreement was that either party to the action might apply to the

(1) It will be seen that the judgments proceed on the assumption that the documents in question were material. It is not thought necessary, therefore, to state the circumstances by reason of which it was suggested that they were material, which were somewhat complicated.

(2) It was stated during the argument that by the law applicable in the Court in the United States it was competent for the parties to make such an agreement for the examination of witnesses without the issue of any commission.

Court in America for the issue of a commission or letters rogatory to take the testimony of any witness or witnesses abroad, or for such order or process as might be deemed necessary to compel the production by a witness or witnesses of papers or documents by them deemed pertinent or relevant to the cause.

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The appellant Colmar Nickels had voluntarily attended at the instance of the plaintiffs for the purpose of being examined as a witness under that agreement, and, when he so attended, had produced certain correspondence between the defendants and the firm of W. L. Nickels & Gordon Ross, as agents of the Serra and Tintore Steamship Company, of a similar nature to correspondence which he subsequently refused to produce, but did not produce other correspondence between the same parties on the ground that it related to private matters. When questioned at that examination as to the existence of bills of lading issued in the name of the defendants' agent in relation to shipments of goods through the Serra and Tintore Steamship Company between the years 1905 and 1910, and of an agreement or agreements in writing under which the Serra and Tintore Steamship Company or the firm of W. L. Nickels & Gordon Ross acted as consignees of certain vessels called the *E. O. Saltmarsh* and *August Belmont*, he promised that he would search for such documents, but subsequently, after an adjournment, he, in effect, declined to produce any such documents.

The plaintiffs then obtained from the Court in the United States letters rogatory addressed to the High Court in this country, requesting that Court to make an order for the examination of the appellant as a witness under the Foreign Tribunals Evidence Act, 1856, s. 1, and for the production by him of (a) all correspondence in his possession or under his control between the Serra and Tintore Steamship Company and the defendants relating to irregularities in bills of lading issued by the defendants to Knight, Yancey & Co. for shipment of cotton between the years 1905 and 1910, and (b) all bills of lading in his possession or under his control for shipments of cotton made by Knight, Yancey & Co. between the years 1905 and 1910, both inclusive, and that the High Court would give full force and

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 1911 taking of the deposition of the witness.

ECCLES & CO. Upon these letters rogatory, an order was made by a Master
 v. at chambers that the appellant Colmar Nickels should attend
 LOUISVILLE before a commissioner for examination, and produce "all books
 AND papers and documents relating to the said matter" (the action
 NASHVILLE before the American Court) "in his possession, custody, or
 RAILROAD control and particularly:—1, all correspondence in his posses-
 COMPANY. sion or under his control between the Serra Line and the
 defendants, the Louisville and Nashville Railroad Company, or
 between any agents of the said line and any agents of the said
 defendants, and between him and the said defendants, relating to
 irregularities in bills of lading issued by the defendants to Knight,
 Yancey & Co. for the shipment of cotton over its line of railroad
 and connecting carriers between the years 1905 and 1910 other
 than such letters and cablegrams as were voluntarily produced
 by the said Colmar Nickels at his examination in this action
 held on July 26, 1911: 2, all bills of lading in his possession
 or under his control for shipments of cotton made by Knight,
 Yancey & Co. over the line of the Louisville and Nashville
 Railroad Company and the line or lines of any other carrier or
 carriers between the years 1905 and 1910, both inclusive:
 3, the agreement or agreements, or a copy or copies thereof,
 between the Serra Steamship Company or its managers, W. L.
 Nickels & Co., and a party at present unknown, under which
 agreement or agreements the Serra Steamship Company or its
 managers acted as consignees of the S.S. *E. O. Saltmarsh* and S.S.
August Belmont between September 1, 1905, and April 20, 1910."

On appeal the above-mentioned order was affirmed by
 Lush J. at chambers, subject to the term that it was not to be
 conclusive as to the obligation of the said Colmar Nickels to pro-
 duce the documents, and that any objection by him was to be still
 open under s. 5 of the Foreign Tribunals Evidence Act, 1856.

The appellant Colmar Nickels attended for examination
 before the commissioner in pursuance of the before-mentioned
 order. He stated then, in substance, that he declined to produce
 any of the correspondence and documents specified in the order
 on the ground that such possession, custody, or control as he

had of them he had merely as a servant in the employ of the firm of W. L. Nickels & Gordon Ross, and he did not consider that it was his place to produce the documents ; that he had no authority from his employer to do so ; that he had not asked his employer for authority to produce them, and that he did not propose to ask him for such authority. He did not suggest that he had been forbidden by his employer to produce the documents, but stated that it was on his own discretion that he declined to do so, because he was only a servant, and not a principal. In an affidavit sworn by the appellant for the purposes of the appeal against the order of the Master for the examination of the appellant under the Foreign Tribunals Evidence Act, 1856, the appellant had sworn that the documents which he was required to produce were not in his possession, custody, or control, but, if any of them might be, they were only in his custody or control as a servant of his employers, and that, if he were compelled to obtain or produce them, he would be disobeying his employers' orders.

An application having been made to Lush J. at chambers for leave to issue a writ of attachment against the appellant for contempt in refusing to produce the documents, the learned judge refused to grant such leave. On appeal the Divisional Court reversed his decision, and granted leave to issue the writ of attachment.

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C. A. not before the Court. It would be a violation of the appellant's
 1911 duty towards his employer to produce these documents without
 being authorized to do so by his employer, and, under these
 ECCLES & Co. circumstances, it is submitted that the Court ought not to make
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 AND to apply to his employer for permission to produce the docu-
 NASHVILLE RAILROAD COMPANY. ments. If the plaintiffs wish for their production, it is open to
 them to take steps to obtain their production by the employer. (1)
 [They cited *Kearsley v. Philips* (2); *Murray v. Walter* (3); *Desilla v. Fells & Co.* (4); *Reg. v. Stuart.* (5)]

Greer, K.C., and *Henn Collins*, for the plaintiffs. The decision in *Kearsley v. Philips* (2) had relation to discovery and inspection of documents, to which different considerations apply. The question here is not one of discovery. It is in substance similar to the question whether under a subpoena duces tecum a witness could under such circumstances refuse to bring a document and produce it in Court in order that the Court might determine whether it ought to be made evidence in the action. It would be for the Court in the United States to determine whether any objection to these documents being made evidence on such grounds as those on which the appellant relies should prevail. The plaintiffs are not now asking for inspection of the documents; they are content that they should be sealed up and transmitted by the Central Office of this Court to the Court in the United States to be dealt with by that Court in accordance with the law in that country. It is submitted that this Court, for the purpose of assisting the administration of justice by the United States Court, ought to exercise all powers which it may have in order to comply with the request by the American Court that the documents should be produced to them: *Desilla v. Fells & Co.* (4) The Court is entitled to compel production of documents from whatsoever source they can obtain it. The question whether the witness in actual custody of a document

(1) It was stated that an application to the Court in the United States for letters rogatory for an order for the examination of W. L. Nickels was pending.

(2) (1882) 10 Q. B. D. 36.

(3) (1839) Cr. & Ph. 114.

(4) (1879) 40 L. T. 423.

(5) (1885) 2 Times L. R. 144.

can be compelled to produce it does not depend upon the legal title to possession of the document, though possibly the question whether on production it should be made evidence may do so. The question whether the objection made by the appellant, namely, that the possession, custody, or control which he has of the documents he has merely as a servant, and that his master has not authorized him to produce them, is a good reason for their not being allowed to be used in evidence is one which would have to be determined by the Court which has to try the action. On a subpoena duces tecum a witness who had the custody or control of a document could not be allowed to say that he had not brought the document with him merely because the custody or control which he had of it was that of a servant. The appellant is in a position similar to that of a witness at a trial who has been served with a subpoena duces tecum. In this case the appellant does not allege that his employer has forbidden him to produce these documents; he admits that he has not asked for his employer's permission to produce them, though he has had ample opportunity for doing so; and he says that, in refusing to produce the documents, he is acting on his own responsibility, and declines to ask for his employer's permission. His is not the case of a mere caretaker or subordinate servant. The inference from his statements is that he has the general management of that department of his employer's business with which the documents which he refuses to produce are connected. The mere statement that he is a servant is equivocal, and may cover very different degrees of authority and independent initiative. Upon the evidence it ought to be presumed against the appellant that it would be no violation of his duty to his master that he should produce the documents. The production by the appellant of similar documents at his previous examination and the statements then made by him shew that it would have been within the scope of his authority to produce them. [They cited *Amey v. Long* (1); *Corsen v. Dubois* (2); *Crowther v. Appleby* (3); *Rex v. Daye* (4); *In re Hawkes*. (5)]

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(1) (1807) 1 Camp. 14, 180a;

(1808) 9 East, 473.

(2) (1816) 1 Holt, N. P. 239.

(3) (1873) L. R. 9 C. P. 23.

(4) [1908] 2 K. B. 333.

(5) [1898] 2 Ch. 1.

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Holman Gregory, K.C., for the appellant, in reply. The language of the order obtained for production of documents is too wide, as it is not confined to the particular documents specified: see *Attorney-General v. Wilson*. (1) [He also cited *Earl of Falmouth v. Moss*. (2)]

VAUGHAN WILLIAMS L.J. This is an appeal against an order for the issue of a writ of attachment against the appellant for alleged disobedience of an order made under the Foreign Tribunals Evidence Act, 1856. I do not think that I need go at length into the provisions of that Act. It is enough for the present purpose to say that it is an Act which, in the case of an action pending in the Court of a foreign country, enables that Court to request the English Court to take part in the trial of the action brought in the foreign country to this extent, namely that, on the request of the foreign Court, it empowers the English Court to make such an order as will enable the evidence of a witness in this country to be given before a commissioner appointed to take his evidence. This is not a power given to the Court in this country to order discovery of documents. It is a power to make an order for the taking of evidence not altogether unlike that which is often made by the Court in this country for the issue of a commission to take evidence in some foreign country in a case pending in the English Court, though there are certain differences between the two procedures. In this case the witness who was to be examined so that his evidence might be used in the Court in the United States was not himself a party to the action: he was merely a witness. The object was to examine him with a view of proving that the railroad company, who were a party to the action, had such knowledge and information as shewed that they had so held out certain bills of lading as being genuine that they were estopped from alleging the contrary. In order to prove this, the plaintiffs sought to obtain the production of documents, which belonged to the defendants, the railroad company, in the sense that they had, in the course of correspondence or of business, passed between them and the agents of the steamship company, the firm of whom the appellant was a servant

(1) (1839) 9 Sim. 526.

(2) (1822) 11 Price, 455.

or an employee, and which were in the possession of that firm. I do not think that it is denied that these documents were in the possession and custody of that firm. The appellant was in the first instance examined, not under any order made by the Court in the United States, but under an agreement between the parties for taking evidence of witnesses in this country. The appellant, having voluntarily attended for the purpose of being examined under that agreement, did actually produce certain documents more or less of the same character as those now in question. The documents so produced by him were undoubtedly documents his relation to which was exactly the same as his relation to the documents which he subsequently refused to produce. After the voluntary examination of the appellant had taken place, and he had produced some documents as I have stated, inasmuch as he did not produce other similar documents, those who desired the production of those documents were not content, and they proceeded to obtain the order under the Foreign Tribunals Evidence Act, 1856, under which an examination of the appellant was held. A good deal of the argument addressed to us by the counsel for the plaintiffs was based upon the fact that, during his examination under the agreement between the parties, the appellant produced some documents similar to those which he has refused to produce upon his examination under the Foreign Tribunals Evidence Act, 1856. We are invited to draw therefrom the inference that really there is no such relation of master and servant between the appellant and his employer as need prevent the production by the appellant of the documents which he refused to produce. He said upon his examination under the order of this Court, "I did produce those few letters because I happened to get hold of them, but I am sorry now I did so, because I do not think it at all necessary for me to do so," and, when he was asked by counsel what had occurred to make him change his mind so as to prevent him producing any other documents, he said, "Because I have been thinking over it since that I have no right to produce these documents or any other documents." It is pressed upon us that we ought to infer from the appellant's action upon the voluntary examination that, when the statutory examination of

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C. A. him as a witness took place, he could have produced these
1911 documents without violating any duty which he owed to his
ECCLES & Co. employer. I cannot draw that inference. I do not think that
v. the fact that the appellant, who seems to have been a perfectly
LOUISVILLE willing witness, produced some documents at the voluntary
AND examination was any bar to his taking up, after further con-
NASHVILLE sideration of the matter, the position which he subsequently
RAILROAD took up at the statutory examination, namely, that he had
COMPANY. thought it over since, and could not produce any more docu-
Vaughan ments because he could not do so without violating his duty
Williams L.J. towards his employer.

Under these circumstances the question which we have to decide is whether or not, by the refusal to produce these documents at the statutory examination,—for there certainly was such a refusal—the appellant was guilty of contempt of Court so as to make him liable to attachment for that contempt, and therefore such an order as was made by the Divisional Court ought to have been made.

I do not propose to go at great length into those cases which have been cited to us as to what are the duties and obligations of a witness who attends in Court under a subpoena duces tecum or under a subpoena ad testificandum. I do intend, however, to say a word or two in the first instance on what the duty of the Court is in respect of this Foreign Tribunals Evidence Act, 1856. I am going to assume, to start with, that all the documents which the appellant has refused to produce are documents which would throw light upon the issues which are likely to be tried in the action. I propose to read a passage from the judgment of Cockburn C.J. upon this point in the case of *Desilla v. Fells & Co.* (1) He said: "I agree with the defendants' counsel that under this Act evidence can only be taken by the English mode: but I am not prepared to say that it must be limited to that which is admissible in English Courts. We ought to afford foreign Courts the fullest benefit we can, and, if we know their rules of evidence, we should give them effect in examinations of this kind: and even where we have no means of knowing the peculiar rules of the

(1) 40 L. T. 423.

particular Court, I think we may fairly admit whatever questions may reasonably be expected to throw light upon the matters in issue, without strictly binding ourselves to our own rules of admissibility." That shews the spirit in which we ought to approach questions of this kind arising under the Foreign Tribunals Evidence Act, 1856, and, as I have already said, in my judgment, the evidence which is sought to be obtained in this case may be assumed to be evidence which may reasonably be expected to throw light on the matters in issue in this case. I, nevertheless, think that these considerations by no means solve the question with which we have to deal here. This is the case of a servant or employee who, according to the view which I take of the evidence, had no authority from his master to produce the documents in question; and upon the evidence before us I also take it that, although he had in a sense possession, custody, and control of the documents, he had not possession, custody, or control of them in the sense that he was justified, as between himself and his master, in shewing them or producing them in evidence without the authority of his master. I do not think that it is really disputed that in point of fact he had not that authority. It is urged that he admits that he never asked for that authority. That is quite true, but, when once the conclusion is arrived at that he is merely a servant, and that his possession, custody, and control of the documents is only such that he cannot properly produce them without the authority of his master, it seems to me to follow that it is impossible to attach him for non-production of them, unless we can draw the inference, which is said to have been drawn by the Divisional Court, that he could without violating his duty to his master produce them. Speaking for myself, I could not assent to a writ of attachment being issued against him, unless I were satisfied that it was not true that he was in such a position that he required an authority from his master for the production of the documents. Under the circumstances, without laying down any positive rule of law as to the production of documents entrusted to a servant,—by production I mean for the present purpose the bringing of the documents into Court ready to be produced if necessary—I am of opinion that in the present case there is no

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C. A. evidence to justify us in coming to the conclusion that the
1911 appellant here could have produced the documents in question
ECCLES & CO. without violating his duty to his employer. For these reasons I
v. think that the appeal should be allowed, and the order for the
LOUISVILLE AND issue of a writ of attachment should be discharged.
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BUCKLEY L.J. In a Court in the United States there is pending an action of *Eccles & Co. v. The Louisville & Nashville Railroad Company*. There have been obtained from the Court in the United States letters rogatory for the purpose of obtaining evidence in this country, and the production of documents from one Colmar Nickels. The parties before us on the present occasion are Colmar Nickels, the appellant, and Eccles & Co., the plaintiffs in the action. The appellant says, in effect, that he is but a servant, and, though he has possession, custody, or control of the documents which he is required to produce in the sense that he has access to them for the purposes of his employment, he has such access to them only because he has possession, custody, and control of them on behalf of his master; and that under those circumstances it is not for him to produce them. The defendants in the action are not before us, nor is W. L. Nickels, the appellant's master. The only parties before us are, as I have said, the witness and the plaintiffs in the action. The order appealed against is an order giving leave for the issue of a writ of attachment against the witness for disobedience of the order obtained for the purpose of giving effect to the letters rogatory. The question is whether the order appealed against can be sustained. In my opinion it cannot.

As regards the question of fact, whether the appellant is only a servant or not, I think that, upon the evidence before us, that is made out to be the case. There is a firm the style of which is W. L. Nickels & Gordon Ross, but it appears to have consisted of only one member, namely, W. L. Nickels. The appellant is in the employ of that firm. He is not a member of the firm. W. L. Nickels appears to have had bad health, and to have been often away from business, and, in his absence, the appellant seems to have exercised a good deal of control over the business of the firm. He was, however, neither the firm, nor in the

position of a master, but only in that of a servant. In that state of things, he was called upon by the plaintiffs before the commissioner who was taking his evidence to produce certain documents relating to the business of the firm, and he has refused to do so.

The question we have to consider upon this appeal is whether he was wrong in refusing to produce those documents. As regards that question it appears to me that it was competent to him to say that, though the documents were in his control, he had control of them merely in the capacity of a servant, and that, if the plaintiffs seek to compel production of them, they ought to bring his principal before the Court and obtain an order for their production in his presence. Here I pause to say that it would appear, though it is not strictly proved, that an application has been made to the Court in America for the purpose of obtaining from that Court letters rogatory to the Court in this country for an order for the examination of the appellant's employer and the production of documents by him. In my opinion the appellant is justified under the circumstances in saying that it is not for him to determine whether the documents should be produced, and that, if production of them is wanted, his master ought to be brought before the Court. What had the plaintiffs to shew in order to obtain an order for the attachment of the appellant? They had first to shew that the documents were in his possession, custody, or control. They have shewn that, but only in a qualified sense. They have shewn that he has them as a servant for his master. They say that, this being so, it is for him to shew that his master has refused to allow him to produce them. I think not. The party who in such a case seeks to attach must make out his case. It is for him to prove that the party sought to be attached has refused to produce the documents, and that his master was willing that he should produce them, that they are in his hands documents capable of being produced. These conditions they have not attempted to fulfil. The power of issuing a writ of attachment for contempt is one which is necessary, but one which in my opinion ought to be exercised in a very guarded manner. Under the circumstances of this case, the order for attachment cannot,

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C. A. I think, be sustained. We were pressed with the argument that
1911 the production of these documents was of very great importance
ECCLES & CO. to the plaintiffs for the purposes of their action. That may be
v. so. They may be documents of which they are entitled to
LOUISVILLE discovery if they can get it from the proper person. Without
AND saying that is so, I will assume it. That cannot, however, lead
NASHVILLE to the result that they ought to get it from a servant without
RAILROAD summoning the master, if the master is the proper person to
COMPANY. summon. They say that, under the circumstances of this case,
Buckley L.J. they may have great difficulty in obtaining production of the documents, unless they can obtain it from the servant, and that the master may say, when brought before the Court, that they are not his documents, but belong to the Serra and Tintore Steamship Company, which is not in this country but in Spain, or somebody else, and that, if the order for attachment is sustained, the appellant will not go to prison but will produce the documents. Assuming all this, it constitutes no reason for sustaining the order of the Divisional Court if it was erroneous. In my opinion this appeal must be allowed.

KENNEDY L.J. I regret that I cannot agree with the other members of the Court. I should not differ from them, unless I had formed a clear opinion on the subject, but, having formed such an opinion, I think I ought to express it, though I need hardly say that it is with diffidence that I do so, on account of my brothers' opinion to the contrary. I am myself most anxious that the exercise of the summary power of the Court to enforce its orders by attachment should be scrupulously and rigidly guarded, but, on the other hand, many orders of the Court can only be enforced by the exercise of that power, and I think that we ought not to shrink from its exercise where such an order has been set at defiance. The question here, which is, no doubt, a difficult one, is whether there has been a defiance or breach of the order of the Court, or whether, on the other hand, the appellant has only done that which it was not only his personal right but his duty to his employer to do in refusing to produce these documents. I will put what I have to say on that question as shortly as possible.

The order made upon the appellant, so far as production of documents is concerned, was to produce what documents were in his possession, custody, or control relating to the action. The point is taken by the appellant's counsel that the documents in question were not, within the meaning of that order, in the appellant's possession, custody, or control. To my mind that is, upon the evidence, an impossible contention. On that point I think that it would be enough for my purpose to quote a passage from the statement of the appellant on his examination where he said "My explanation is that these papers you have asked me for came into my custody after the death of Mr. Willings. In the natural course of business they came round to my custody, but there is no occasion for me to look at these papers, and there is no necessity for having looked at them." In addition to that, so far as this point is concerned, it is undisputed that, at the voluntary examination of the appellant under the agreement between the parties, he did produce a number of documents of the same kind without making the slightest difficulty, and, what is still more important to my mind, he furthermore promised that he would subsequently bring, or at any rate search for, the rest of the documents which he was asked to produce. It seems to me that it would have been impossible for him to say this if he had not the necessary possession, custody, or control of the documents. Moreover, when I consider the nature of his answers as a whole upon his examination under the order of the Court, I cannot help thinking with the Divisional Court that he had the power to produce these documents.

Then, what is the law in relation to the question? The appellant is a servant in the sense that he is paid a salary for his services, and is not a partner. One knows very well, as a matter of business,—and one is entitled to avail oneself of one's knowledge of life and business—that there are various degrees of control which clerks in a mercantile office may have, and that in the case of a salaried principal clerk, such as the appellant was, the degree of control and independent action entrusted to him may often be very large. I therefore think that the counsel for the plaintiffs were right in suggesting

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C. A. that the word "servant" used in this connection is a very
 1911 equivocal one, and may be very misleading in such a case.
 ECCLES & CO. It may cover various grades of confidence and discretionary
 v. power. The question in such a case is whether the matter is
 LOUISVILLE one in which the servant is bound to act only when he gets
 AND express orders from his employer. In this case there is really
 NASHVILLE no evidence that the servant has been forbidden to produce these
 RAILROAD documents. It is not a very favourable feature of the case for
 COMPANY. the appellant that, in an affidavit used by him upon the appeal
 Kennedy L.J. to Lush J., he did venture to say—I do not want to be too
 critical as to that, because affidavits are sometimes carelessly
 sworn without any intention to deceive—that the documents
 which he was required to produce were not in his possession,
 custody, or control, but, if any of them might be, these were
 only in his custody or control as a servant of his employers, and
 that, if he were compelled to produce them, he would be disobey-
 ing his employers' order; but a few days later he had to admit
 that the latter statement was untrue, and that he had never asked
 for, or been given by his master, any orders as to these documents
 or the disclosure or production of them. He had also to admit
 that, though a servant, he was in so high a position in the office
 that he could not mention any one who could give him orders as
 to these documents when his master was absent, which was fre-
 quently the case on account of bad health. I think that, upon the
 evidence, it appears that there could hardly be a servant in
 a higher position in a mercantile office than that which he
 occupied.

The question still remains whether it is the law that, where an order has been made for the production of documents under the Foreign Tribunals Evidence Act, 1856, and the person on whom the order is made refuses to produce them on the ground that he is in custody of them merely as a servant, that excuse by itself ought to be considered sufficient to prevent him from being held to have disobeyed the order of the Court by refusing to produce the documents. With great respect, I am sorry to differ on a question of law of this kind, but no case has been cited to us in which it has been so held; and, although there may be no case exactly on all fours with this, I think the inference from the cases

is the other way. It appears to me impossible to read the judgment in a case where, as in *Crowther v. Appleby* (1), the question whether a witness could excuse himself for the non-production of documents, as being a servant, was made to depend on the express orders of his employers not to produce them, otherwise than as forming ground for the inference that the mere relation of master and servant is not of itself a sufficient excuse in such a case. In that case Brett J. said: "This is not the case of a document in Court in the possession of a servant, who refuses to produce it. If it had been, I think he would have been bound to produce it." If there is from the mere relation of master and servant an unqualified duty to the master not to produce, it cannot make it any the less a duty which the Court will uphold that the servant happens to have brought the document in his pocket to the Court. His duty to his master cannot cease when he enters the precincts of the Court with the document, but the learned judge says that, if the witness were a servant who had the document in Court, and objected to produce it, he should have been ordered to produce it. Then the learned judge proceeds: "The question then is whether a servant is liable to an attachment for refusing to bring up documents when his masters expressly refuse to allow him to do so." Here there has been no such refusal, and the servant has had further to confess that he has had plenty of opportunity of asking his master for orders in the matter, and that he has not asked. It appears to me that, having in effect promised at a previous examination to bring these documents, it would have been the action of a servant acting bona fide in the matter, if on further reflection he had come to the conclusion that he ought not to produce them without his master's authority, to go to his master and ask for permission to produce them and to fulfil his promise. There is no suggestion here that he did anything of the kind. There has not been produced on any occasion any affidavit made by the master with reference to this matter—and this was not a hole and corner matter—to the effect that, as a third party and no party to the litigation, he objected to the production of these

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C. A. documents. It seems to me, looking at these facts, that, while
1911 the law clearly is that a servant, whatever his position, who is
ECCLES & CO. told by his master not to produce documents belonging to him,
v. has an excuse for non-production which the Court will accept, not
LOUISVILLE only is there no authority for saying that the mere statement by a
AND person required to produce documents that he has the possession
NASHVILLE of them as a servant has ever been held sufficient to justify a
RAILROAD refusal to produce them, either in Court or before a commissioner,
COMPANY. but also there is a statement of Brett J. in *Crowther v. Appleby* (1)
Kennedy L.J. shewing that the basis of his judgment in that case is that
there were express orders by the master not to produce the
documents. There is no authority, so far as I know, for the
proposition that it is always the implied duty of a person who
says that he has possession of documents merely as a servant
to disobey the order of the Court in such a case for their
production. It has never been contended by the plaintiffs
in the present case that, if the appellant had produced these
documents before the commissioner, they should have been dealt
with otherwise than in a manner which would have preserved
until the trial the rights of all the parties. The plaintiffs'
counsel said that they did not claim to see the documents, and
were content that they should be sealed up and returned to
this Court for transmission to the American Court, leaving
open all objections to their admissibility or production in evidence
at the trial on any ground which might be available. My
view is that the Divisional Court were right in holding on the
evidence that the appellant was in possession, custody, or control
of these documents, and that he would not be violating his duty to
his employer in producing them. I venture therefore to think that,
unless it be a true proposition to say that, when documents are
in the possession of a person, it is a sufficient reason for his
refusing to obey an order made by a judge for their production
to say merely that he is a servant, although (as I think is the
fair result of the evidence here) that person cannot shew that
he has any order from his master not to produce them, or that
he will be violating any duty to his master in producing them,
the order made by the Divisional Court was correct. On his first

examination the appellant entertained no doubt, apparently that he could produce these documents, because he then said in answer to questions as to letters and other documents that he would make diligent search for them. I confess myself unable to look upon the answers which he then gave as being the answers of a man who was under such orders, or under such terms of contract or employment, as forbade him to obey the order of the Court for the production of the documents, not necessarily for the purpose of making them evidence, but for the purpose of their being ultimately dealt with in the Court of the country in which the litigation is pending, and which has asked the Court here to assist them in furthering the ends of justice by the production of documents. I can see no ground for thinking that it would have been any violation of his duty to his master by the appellant if he had produced these documents, which he once supposed that he could do, and promised to do, and which he has never asked his master subsequently to be allowed to do, and as to which his master has not in fact given him any order not to produce. For these reasons I think that the order appealed against was right.

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Appeal allowed.

Solicitors for appellant: *Stanton & Hudson, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for respondents: *Pritchard & Englefield, for Simpson, North, Harley & Co., Liverpool.*

E. L.

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HOLLAND, APPELLANT *v.* PEACOCK AND ANOTHER,
RESPONDENTS.

Justices—Case stated—Transmission by Appellant to Crown Office—Time—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2—Pauper—Act of Immorality in Workhouse—Misbehaviour—Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 5.

Under s. 2 of the Summary Jurisdiction Act, 1857, where a case is stated by a magistrate, the appellant shall within three days after receiving the case transmit it to the Crown Office of the King's Bench Division. A case was deposited in the letter-box at the Royal Courts of Justice on the third day, but at so late an hour that the case was not received at the Crown Office until the following day :—

Held, that s. 2 had been complied with.

An act of immorality committed by a pauper in a workhouse is evidence of "misbehaviour" by the pauper within the meaning of s. 5 of the Poor Relief Act, 1815.

CASE stated by the stipendiary magistrate for Liverpool.

The respondents Frank Peacock and Catherine McKay were brought in custody before the magistrate on a charge preferred by the appellant, acting for and on behalf of the select vestry of the parish of Liverpool, for that they on May 29, 1911, then being persons maintained in the workhouse of the said parish, were guilty of certain misbehaviour contrary to the Poor Relief Act, 1815. (1)

(1) Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 5: "And whereas persons maintained in public workhouses sometimes refuse to work, or are guilty of drunkenness and other misbehaviour, and by the laws in being no sufficient punishment is provided for such offences; Be it therefore enacted, that in case any person or persons maintained in any public workhouse established for the relief, maintenance, and employment of the poor shall refuse to work at any work, occupation, or employ-

ment suited to his, her, or their age, strength, and capacity, or shall be guilty of drunkenness or other misbehaviour, every such person or persons, being thereof lawfully convicted before any justice or justices of the peace, shall thereupon by such justice or justices of the peace be committed to the common gaol or house of correction, there to remain, without bail or mainprize, for any period of time not exceeding twenty-one days, and during such time to be kept to hard labour."

Upon the hearing of the charge the following facts were proved or admitted :—

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On May 29 in the afternoon the respondent Peacock, who was then an inmate in the workhouse, was directed to clean certain windows at the workhouse, and the respondent Catherine McKay, who was also then an inmate, was directed to scrub the floor of a bath-room. At about 3 P.M. a nurse employed at the workhouse found the respondents together on the floor of the bath-room, their clothing being disarranged. Each of the respondents when before the magistrate admitted having had carnal connection with the other in the bath-room on the day in question.

The magistrate, having regard to the general terms of the judgment in *Mile End Guardians v. Sims* (1), doubted whether the conduct of the respondents amounted to "misbehaviour" within the meaning of s. 5 of the Poor Relief Act, 1815, and he therefore dismissed the charge.

The question for the opinion of the Court was whether the magistrate came to a correct determination and decision in point of law, and if not, what should be done in the premises.

On the case being called on, the Master of the Crown Office pointed out to the Court that it appeared doubtful whether the appellant had complied with the requirements of s. 2 of the Summary Jurisdiction Act, 1857 (2), as the case had been signed on July 8 and was indorsed as having been received in the Crown

(1) [1905] 2 K. B. 200.

(2) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2: "After the hearing and determination by a justice or justices of the peace of any information or complaint, which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state

and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the Superior Courts of Law to be named by the party applying; and such party, hereinafter called 'the appellant,' shall, within three days after receiving such case, transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called 'the respondent.'"

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Office on July 12. Counsel for the appellant stated that he was instructed that the case was placed in the letter-box at the Royal Courts of Justice at 10 P.M. on July 11.

Rigby Swift, for the appellant. Sect. 2 of the Summary Jurisdiction Act, 1857, requires the appellant to "transmit" the case to the Court within three days after receiving it. The lodging of the case at the Courts on July 11, though after office hours, was a sufficient compliance with the statute. In *Arnold v. Townsend* (1) the Court in similar circumstances heard the case. On the facts, the respondents should have been convicted. It was pointed out in *Mile End Guardians v. Sims* (2) that the word "misbehaviour" in s. 5 of the Act of 1815 includes any outrageous or improper conduct in the workhouse. Under the special regulations in force in Liverpool immorality is deemed to be refractory conduct for which a pauper may be taken before a magistrate to be dealt with.

No one appeared for the respondents.

LORD ALVERSTONE C.J. Our attention has been called to the fact that it is not clear whether the requirements of s. 2 of the Summary Jurisdiction Act, 1857, have been complied with. The case was not actually received at the Crown Office until the morning of July 12, but it is stated that it was in fact lodged in the letter-box at the Courts at 10 P.M. on July 11. This fact must be verified by an affidavit. Sect. 2 of the Summary Jurisdiction Act, 1857, imposes a number of conditions which have to be observed by an aggrieved party who desires to have a case stated by a magistrate for the opinion of this Court, and if those conditions are not strictly observed this Court has no jurisdiction to hear the case. I was not aware that the particular point which arises in this case had ever been considered, but counsel for the appellant has told us that there was a case in 1896 in which the Court heard the case in circumstances similar to those of the present case. Sect. 2 says that the case must be transmitted to the Court within three days after it has been received by the appellant. There is in my opinion a distinction between

(1) Unreported. May 1, 1896.

(2) [1905] 2 K. B. 200.

transmitting a document and serving it. If the word "serve" had been used in the section the objection would probably have been fatal, for service can only be effected between certain prescribed hours; but as the section only says "transmit," in my opinion we ought not to apply to this case the rules as to hours of service, which would in some cases give rise to great difficulty. I think that there was in this case a compliance with the section.

With regard to the merits I regret that we have heard no argument on behalf of the respondents, for an argument might possibly have been based on the fact that there is a general order in Liverpool dealing with this kind of misconduct. But however that may be, I am unable to take the view that the facts proved or admitted in this case are not evidence that the respondents have been guilty of misbehaviour within s. 5 of the Act of 1815. In *Mile End Guardians v. Sims* (1) the Court was dealing with the case of a pauper whose alleged misbehaviour was his refusal to go from one workhouse to another, but I pointed out that there might be many cases of misbehaviour by a pauper while in the workhouse, not necessarily of the nature of drunkenness, but cases of outrageous or improper conduct, which would render the pauper liable to be dealt with under s. 5.

The case must, therefore, go back to the magistrate for him to deal with it.

HAMILTON and BANKES JJ. concurred.

Appeal allowed.

Solicitors for appellant: *W. W. Wynne & Sons, for T. J. Smith & Son, Liverpool.*

(1) [1905] 2 K. B. 200.

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Nov. 27.

[COURT OF CRIMINAL APPEAL.]

THE KING v. LEVY.

Criminal Law—Felony—Accessory after the Fact—“Receive harbour and maintain”—Removal of Incriminating Articles after Arrest of Principal Felon.

After the arrest of a man charged with a coining offence (of which he was subsequently convicted) the appellant, a woman, removed from a workshop occupied by him certain articles which would be used in making counterfeit coin. The appellant was indicted as an accessory after the fact, the indictment alleging that she, well knowing the man to have committed the felony charged, “did feloniously receive harbour and maintain” him. The jury were directed that, if they believed that the appellant removed the articles knowing the man to be guilty and for the purpose of assisting him to escape conviction, they should find the appellant guilty. The jury convicted the appellant:—

Held, that the direction was right, and that the conviction must be affirmed.

CASE stated for the opinion of the Court by the Common Serjeant of the city of London.

The case was as follows:—

“Beatrice Levy was tried before me with a man George Green on an indictment charging them with the felonious possession of a mould for coining counterfeit florins, and in another count Levy was charged with the felony of being an accessory after the fact to the said felony committed by George Green. There was, in my opinion, no evidence against Levy in support of the count charging her with being in possession of the mould, and she was acquitted on that count. Green was convicted on that count.

“There was evidence that Levy, after Green’s arrest, for the purpose of preventing his being convicted removed from a workshop occupied by him a number of fragments of other coining moulds and other things such as would be used in making counterfeit coin and which would be adducible, and which were in fact produced, in evidence against him. I doubted whether

these acts on the part of Levy were sufficient to support the count for receiving harbouring and maintaining Green, the principal felon.

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"But I directed the jury that if they were satisfied that she removed the things mentioned from Green's workshop, knowing that he was guilty of committing the felony charged against him, and did so for the purpose of assisting him to escape conviction, they should find her guilty.

"The jury found her guilty and she was sentenced to three months' imprisonment with hard labour.

"The question for the Court is whether this direction was right: see *Reg. v. Butterfield*. (1)"

The count of the indictment on which the appellant was convicted was as follows:—"And the jurors aforesaid upon their oath aforesaid do further present that Beatrice Levy . . . well knowing the said George Green to have done and committed the said felony in form aforesaid afterwards to wit on the day and year aforesaid him the said George Green did feloniously receive harbour and maintain against the form of the statute in such case made and provided and against the peace of our Lord the King his Crown and dignity."

F. Watt, for the appellant. In order to substantiate the charge of being accessory after the fact there must be evidence that the party charged did some act to assist the felon personally: *Reg. v. Butterfield* (1); *Reg. v. Chapple*. (2) There was no evidence of personal assistance in this case, for the acts of the appellant relied on by the prosecution were not committed until after the principal felon had been arrested. This indictment does not contain the word "assist," as was the case in *Reg. v. Butterfield* (1) and *Rex v. Greenacre* (3), and even if evidence of personal assistance is not necessary, the facts proved here do not amount to either receiving, harbouring, or maintaining. The appellant may have been guilty of some offence, e.g., interfering with the administration of justice: see *Coke's Institutes*, vol. 3, p. 139; but there was no evidence on

(1) (1843) 1 Cox, C. C. 39.

(2) (1840) 9 C. & P. 355.

(3) (1837) 8 C. & P. 35.

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which she could be convicted of being an accessory after the fact. [He also referred to *Rex v. Blackson*. (1)]

Beaumont Morice, for the Crown. It is not necessary that the indictment should contain the word "assist," nor need there be evidence of an act of personal assistance to the principal felon. The words "receive" and "maintain," which are to be found in the form of indictment given in Archbold's Criminal Pleading, are technical words and apply to any assistance whatever given to the principal felon to hinder his being arrested, tried, or suffering punishment: *Hawkins' Pleas of the Crown*, bk. 2, c. 29, ss. 25 and 26; *Stephen's Commentaries*, vol. 4, c. 3.

Watt replied.

The judgment of the COURT (Lord Alverstone C.J., Hamilton and Bankes JJ.) was delivered by

LORD ALVERSTONE C.J. The Court is of opinion that this conviction must be affirmed. The appellant was indicted as an accessory after the fact, and the indictment alleges that she did "feloniously receive harbour and maintain" the principal felon. It cannot be denied that it has been the practice for many years to use that form of words when indicting a person for being an accessory after the fact. It is contended for the appellant that the evidence given at her trial did not shew that the appellant had received, harboured, or maintained the principal felon, who had in fact been arrested some days before the commission by the appellant of the acts relied on by the prosecution. It is possible that the word "harbour" in this connection may bear the narrower meaning which is given to it in popular language, but certainly the word "receive" has a technical meaning, and perhaps also the word "maintain." In *Hawkins' Pleas of the Crown*, bk. 2, c. 29, s. 25, the author says: "As to the third point, viz. In what cases a man shall be adjudged an accessory after: I shall endeavour to shew, 1. what kind of receipt of a felon will make the receiver such an accessory"; and in s. 26: "It seems agreed that, generally, any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering

(1) (1837) 8 C. & P. 43.

the punishment to which he is condemned, is a sufficient receipt for this purpose." That passage was cited in argument in *Reg. v. Butterfield* (1), and Maule J. said that there was evidence of comforting and assisting which would make the prisoner an accessory after the fact. In Stephen's Commentaries, vol. 4, c. 3, it is stated that, "Generally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory." In our opinion this indictment correctly describes the offence of being an accessory after the fact; but in any case it is not necessary for us to consider whether the indictment ought to have contained the word "assist," for the Common Serjeant told the jury that they ought not to convict the appellant unless they were satisfied that the appellant did the acts complained of with the knowledge that Green, the principal, was guilty and for the purpose of assisting him to escape conviction. That direction was entirely in accordance with the law as stated in the passage from Hawkins' Pleas of the Crown which I have read, and which shews that if the jury believed the evidence for the prosecution the appellant was proved to be an accessory after the fact.

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Conviction affirmed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) 1 Cox, C. C. 39.

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Oct. 24.

SMITH v. NEWMAN AND OTHERS.

*Parliament—Registration of Voters—Occupier — Dwelling-house — Rating—
Payment of Rates—Agreement between Owner and Occupier — Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3—Poor
Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41),
ss. 7, 19.*

By s. 3 of the Representation of the People Act, 1867, every inhabitant occupier of a dwelling-house shall be entitled to be registered as a voter who is qualified as follows: "3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him . . . to all rates (if any) made for the relief of the poor in respect of such premises; and 4. Has on or before" a specified date "bona fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to" a date named.

The appellant was the occupier of a dwelling-house in a parish forming part of a borough. His name was entered in the rate-book of the parish in which the house was situate as the occupier of the house, which was valued at a certain rateable value, a certain sum being assessed upon the occupier. The name of the owner was also entered in the rate-book, and nothing was assessed upon the owner. It was proved that the rates if unpaid would be collected from the appellant, and that in default of payment a distress would be levied on his goods.

The owner made an agreement with the rating authorities of the borough by which he agreed to pay the general district rates in respect of the house and by which he agreed to pay and under which he did pay to the overseers of the parish the poor rate for the same house:—

Held, that the appellant was rated as an ordinary occupier in respect of the house within the meaning of s. 3, sub-s. 3, of the Act.

And, the Court inferring an agreement between the appellant and the owner under which the latter paid the poor rate for the former,

Held, also, that the appellant had bona fide paid the poor rate in respect of the house within the meaning of s. 3, sub-s. 4, of the Act, and consequently that he was entitled to be registered as a voter.

CASE stated by a revising barrister.

The name of William Smith, the appellant, appeared on Division I. of the occupiers' list of electors for the parish of Newport as a parliamentary elector for the parliamentary district borough

of Monmouth, and as a burgess for the municipal borough of Newport as hereunder :

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Name of Elector in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Smith, William	2, Caxton Place	Dwelling-house	2, Caxton Place

Objection was made to the name of the appellant being retained in the list, the notice of objection stating “ That you ” —the appellant—“ were not a rated occupier of the qualifying property in accordance with s. 7 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102).”

It was admitted that the appellant had, during the qualifying period, been the inhabitant occupier as tenant of the whole of the premises, which formed an ordinary dwelling-house, and were separately rated, the rateable value being 12*l.*, and that the landlord, who did not reside in the house, paid all the rates in respect of the premises. The appellant’s name appeared in the occupiers’ column of the rate-book as follows :

Number.	Name of Occupier.	Name of Owner.	Description of Property.	Number in Street.	Name or Situation of Property.	Old Valuation.		New or Altered Valuation.	
						Gross Estimated.	Rateable Value.	Assessed upon Occupier.	Assessed upon Owner.
4220	William Smith	Griffith Griffiths	House	2	Caxton Place	£ s. d. 15 0 0	£ s. d. 12 0 0	£ s. d. 1 4 0	£ s. d. ,

The landlord entered into an arrangement with the rating authorities to pay the general district rates from time to time made by the rating authorities, in respect of the premises of which he was the owner, at the rate of one half the net annual value, agreeing to pay such rates whether the premises were occupied or unoccupied, and within four months of their being made, and also undertook to pay the water charges for the premises, and further to pay to the overseers of the parish of Newport the poor rates for the premises in respect of the period of occupation.

The agreement was contained in a circular letter sent out by the superintendent rate collector and an application form signed

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by the appellant, copies of which were set out in a schedule to the case. The circular, omitting formal parts, was as follows :

"The council, to obviate the necessity of a dual collection of rates for the same properties, has ordered that, as it is in the option of the corporation to allow of composition for the general district rates, it be made a condition of allowing it in the future that the landlord shall pay all rates on the properties compounded for.

"To compound for the general district rates for these houses, you must consent to pay the poor rates and water charges also.

"If you agree to do so, please sign and return the enclosed form of agreement, within one week from date. If the form is not returned, or no reply received, it must be understood that the full rates will be charged. By order of the Council, E. Sheppard, Superintendent Collector."

The application form, or form of agreement, omitting formal parts, was as follows :

"I hereby apply to be rated for the general district rates from time to time made by you, in respect of the premises set out below, of which I am the owner, at one half of the net annual value; agreeing to pay such rates whether the premises are occupied or are unoccupied, and within four months of their being made.

"And I also undertake, if my application be granted, to pay the water charges for such property, and further, to pay to the overseers of the parish of Newport the poor rates for such premises in respect of the period of occupation. Dated &c."

Pursuant to this agreement and to s. 211 of the Public Health Act, 1875, the landlord paid the general district rates by way of composition upon half the rateable value, but paid the poor rates and water charges in full. There were no borough rates.

The superintendent rate collector was called, and stated that the demand note was in the first place served on the landlord, but that no personal liability rested on him; that, should the landlord become insolvent or refuse to pay, a demand note would be served upon the appellant, on whom the ultimate liability rested; that the rates would be collected from the appellant, and that, if default was made, a distress would be levied on the goods of the appellant.

The witness further stated that it was his practice in the case of such dwelling-houses to serve the assistant overseer on or about June 12 in each year with a list of cases in which the rates were usually paid by the landlords and were unpaid on that day.

The assistant overseer was called and said that this was so, and that it was his practice to send out notices to the tenants in such cases on June 20 in each year that they would not be entitled to have their names inserted in the list of electors then about to be made as occupiers unless on or before July 20 then next all sums due in respect of those premises on assessment of any poor rate were duly paid.

The revising barrister held that the appellant was not a rated occupier within the Representation of the People Act, 1867 (1),

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(1) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3: "Every man shall . . . be entitled to be registered as a voter . . . for a member or members to serve in Parliament for a borough, who is qualified as follows; (that is to say,)

"1. Is of full age, and not subject to any legal incapacity; and

"2. Is on the last [now the 15th, see Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 7] day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and

"3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in

respect of such premises; and

"4. Has on or before July 20 in the same year bona fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding January 5:

"Provided . . . &c."

Sect. 7: "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"1. After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to

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the rateable value being over 8*l.*, namely, 12*l.*, and that the case was covered by the decision of the Court of Appeal in *Kent v. Fittall* (1), as it applied to all inhabitant occupiers, and that the objection to the appellant's vote was good.

The names of 1284 other persons whose names and qualifications were set out in a schedule to the special case were objected to under similar circumstances. The revising barrister expunged the names of the appellant and of the 1284 other persons from Division I. of the occupiers' list for the parish of Newport. Notice of appeal from the decision in the case of the appellant and each of the other persons was given; it was ordered that the appeals should be consolidated; and the town clerk of Newport, the town clerk of Monmouth, and the overseers of the poor of the parish of Newport were on the requirement of the appellant named as respondents in the appeal.

the poor rate instead of the occupier, except as herein-after mentioned :

- "2. The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book :

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate.

"Provided . . . &c."

Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 7: "Every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated

instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate."

Sect. 19: "The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; . . ."

(1) [1911] 2 K. B. 1102; 2 Sm. Reg. Cas. 279.

Foote, K.C. (Lewis Coward, K.C., and Daldy with him), for the appellant. The revising barrister was in error in supposing that the decision in *Kent v. Fittall* (1) in any way affects this case. There is here no question of the lodger franchise. The appellant and the 1284 other persons in the like case with him are all inhabitant occupiers; and they are, and no one else is, rated to the poor rate. It is true that for their own purposes the rating authorities and the owner of the premises have agreed that the owner's hand shall be the hand to pay the money; but that does not prevent the appellant from being the rated occupier. Then have these persons paid the rates as required by sub-s. 4 of s. 3 of the Representation of the People Act, 1867? Clearly they have, because s. 7 of the Poor Rate Assessment and Collection Act, 1869, enacts that every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, is to be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate. To put the position shortly, personal rating is necessary, but personal payment of the rates is not necessary to qualify an inhabitant occupier under s. 3 of the Representation of the People Act, 1867.

Kent v. Fittall (1) was an entirely different case. There the claimants and persons objected to had either claimed to be registered or had been placed upon the list as inhabitant occupiers. In truth they were all lodgers. None of them appeared in the rate-book as rated occupiers, and consequently none of them had either in fact or in law paid the rates. The Court of Appeal held that none of the circumstances existed enabling the owners of the tenements to be rated instead of the occupiers, and consequently that the claimants and persons objected to, not being themselves rated and not having actually or constructively paid any rates, could not be registered. In the present case the owner has not been rated, and the appellant has been rated, and by virtue of s. 7 of the Poor Rate Assessment and Collection Act, 1869, is to be deemed to have paid the rates; consequently he and the 1284 other persons are entitled to be registered.

(1) [1911] 2 K. B. 1102; 2 Sm. Reg. Cas. 279.

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A. Comyns Carr, for the respondents. It does not follow that because the name of an occupier appears in the rate-book he is therefore rated as required by sub-s. 3 of s. 3 of the Representation of the People Act, 1867. In the present case the name of the appellant was inserted in the rate-book in supposed compliance with s. 19 of the Poor Rate Assessment and Collection Act, 1869, and on the footing that the owner is rateable and rated instead of the occupier. As a matter of law in this particular case the owner could not be rated instead of the occupier, because the rateable value of the premises was too high to permit of that being done. *Kent v. Fittall* (1) decided that unless some statute authorizes the rating of the owner, any attempt to rate him instead of the occupier is a nullity. Accordingly the agreement in this case, by which the owner undertook to pay the rates, is a nullity. Payment under it by the owner is no payment by the appellant. The owner cannot be rated in law and the appellant has not been rated in fact. It follows that by sub-s. 3 of s. 3 of the Act of 1867 he is not entitled to be registered as an inhabitant occupier : *Kent v. Fittall*. (2)

Counsel was not called upon in reply.

DARLING J. This case raises an important point affecting the position of the appellant and 1284 other persons in the like case whose names the revising barrister has struck off the list. It is only necessary to deal with the case of the appellant, William Smith. He had during the whole of the qualifying period been the inhabitant occupier as tenant of the whole of the house, which formed an ordinary dwelling-house and was separately rated, the rateable value being 12*l*. The landlord, who did not reside in the house, paid all the rates in respect of the premises. The appellant's name appeared in the occupiers' column of the rate-book as the occupier of the house, No. 2, Caxton Place, of which the gross estimated rental was 15*l*., and the rateable value was 12*l*., the rate assessed on the occupier being 1*l*. 4*s*., and nothing being assessed on the owner. It was stated that the landlord entered into an

(1) [1911] 2 K. B. 1102; 2 Sm. Reg. Cas. 279, at p. 311.

(2) [1911] 2 K. B. 1102; 2 Sm. Reg. Cas. 279.

arrangement with the rating authorities to pay the general district rates from time to time made in respect of the premises of which he was the owner, at the rate of one half the net annual value, he agreeing to pay such rates whether the premises were occupied or unoccupied and within four months of their being made, and also undertaking to pay the water charges for the property, and further to pay to the overseers of the parish of Newport the poor rates for the premises in respect of the period of occupation. Pursuant to this agreement and to s. 211 of the Public Health Act, 1875, the landlord paid the general district rates by way of composition upon half the rateable value, but paid the poor rates and water charges in full. According to the evidence of the superintendent rate collector, the demand note was in the first instance served on the landlord, although it is true that in the witness's view no personal liability rested on the landlord. The meaning of that is not quite clear. He would, I take it, be personally liable if sued by the proper person, but it is not necessary to pursue this matter further. The superintendent rate collector proceeded to state that, if the landlord became insolvent or refused to pay, a demand note would be served on the appellant, on whom the ultimate liability rested; that the rates would be collected from the appellant; and that if default was made a distress would be levied on his goods.

On these facts the revising barrister held that the appellant was not a rated occupier within the Representation of the People Act, 1867, and that his case was covered by the decision of the Court of Appeal in *Kent v. Fittall* (1), as it applied to all inhabitant occupiers. He therefore held that the objection to the appellant's vote was good.

In order to see whether the appellant is entitled to the franchise it is necessary to consider s. 3 of the Representation of the People Act, 1867. [The learned judge read sub-ss. 1, 2, and 3 of s. 3, and continued:] It is plain that the appellant was, during the time of his occupation, rated as an ordinary occupier in respect of the premises occupied by him to all rates made for the relief of the poor in respect of the premises. Then comes sub-s. 4. [The learned judge

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read sub-s. 4 of s. 3, and proceeded:] Has the appellant paid an equal amount in the pound to that payable by other ordinary occupiers as required by that subsection? In my opinion he has paid it. It is true that he entered into an agreement with his landlord that the landlord should pay the money for him, and that the overseers agreed to look to the landlord as the person from whom they were to receive it; but at the same time they reserved the right to apply to the appellant in case the landlord did not pay it. The revising barrister has held that the appellant was not the rated occupier because he did not pay the rate himself. But in effect he did pay it; it was paid as his money although not by his own hand. Why should not he make an agreement with another that the other shall pay for him? And why should not the rating authorities accept the payment made by the other as a payment on account of the person liable? It is suggested that there is some material distinction between the case where a man pays with his own hand and the case where some other person pays on his behalf; that the former case is enjoined and the latter forbidden by statute. But so far from that, s. 7 of the Poor Rate Assessment and Collection Act, 1869, seems to contemplate payment made by the owner on behalf of the occupier. That section provides that "Every payment of a rate by the occupier . . . and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate . . . shall be deemed a payment of the full rate by the occupier . . ." The owner then may agree with the occupier or with the overseers to pay the rates. Surely payment so made by the owner on behalf of the occupier is good payment by the occupier. Once the owner had so paid for him the occupier could not be distrained upon for the rate. It is said that for the purposes of the franchise it is otherwise; but if there could be any doubt on this point it is made perfectly clear by the later words of s. 7 of the Act of 1869, that "every payment so made shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate." Therefore the occupier can say that he has paid the rate and paid

it in full within the meaning of sub-s. 4 of s. 3 of the Representation of the People Act, 1867. There has been a bona fide payment by the occupier himself although it has been made by the hand of the owner. Mr. Carr contended that no such construction as I have placed upon s. 3, sub-s. 4, of the Act of 1867 is permissible in view of the provisions of s. 19 of the Act of 1869 as interpreted by the Court of Appeal in *Kent v. Fittall* (1), and that because of that decision the reasoning which I have just applied is not applicable. In my view the present case is not touched by *Kent v. Fittall*. (1) In that case the owner himself was rated for the whole house. Vaughan Williams L.J. relied upon that fact in his judgment. After reciting the qualifications specified in the four sub-sections of s. 3 of the Representation of the People Act, 1867, entitling the occupier of a dwelling-house to be registered as a voter, and particularly referring to the conditions in sub-ss. 3 and 4, the Lord Justice said (2): "It is common ground here that neither of these conditions has been complied with. Then it might be suggested that there are exceptions to these conditions. There are exceptions under ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869. It is not contended here that the voters represented by the appellant come within either of those sections." Then after holding that s. 14 of the Parliamentary and Municipal Registration Act, 1878, did not operate as an exception to the requirements of sub-ss. 3 and 4 of s. 3 of the Act of 1867, the Lord Justice concludes thus: "The result of that section is that it is quite impossible in this case, in which no rate has been made upon or paid by the occupier, for the occupier to claim to be entitled to this franchise." (3) Therefore it is plain that the Lord Justice bases his judgment on this, that the occupier was not rated and that he had not paid rates. In the present case it is common ground that the occupier is rated and that sub-s. 3 of s. 3 of the Act of 1867 has been complied with. The two cases therefore are poles asunder. Furthermore, in my opinion, sub-s. 4 has also been complied with for the reasons I have given above.

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(1) [1911] 2 K. B. 1102; 2 Sm. 2 Sm. Reg. Cas. 279, at p. 312.
 Reg. Cas. 279.

(3) [1911] 2 K. B. 1102, at p. 1117;

(2) [1911] 2 K. B. 1102, at p. 1116; 2 Sm. Reg. Cas. 279, at p. 314.

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Therefore *Kent v. Fittall*(1) has no application to this case ; the reasoning which I have applied is unaffected by that decision ; and this appeal must be allowed, and the names of the appellant and the 1284 other voters must be restored to the list.

BANKES J. I am of the same opinion. It is said that the appellant and these 1284 other persons are not qualified to have their names on the register of electors for two reasons : first because they have not been rated as ordinary occupiers in respect of the premises occupied by them ; and secondly because, if so rated, they have not before the specified date bona fide paid an equal amount in the pound to that paid by other ordinary occupiers in respect of poor rate. The answer to these objections seems clear. First, as a matter of fact, the names of these persons did all appear in the rate-book as persons rated in respect of the premises occupied by them. Mr. Carr contended that although their names appear in the rate-book they were only there because the overseers had placed them there under s. 19 of the Act of 1869, although they were not in truth rated or liable to be rated. For that contention I see no ground whatever. Prima facie the rate-book is the best evidence as to who is rated in respect of the premises in question. Of course if evidence was forthcoming to shew that the overseers had in truth placed the names in the rate-book under s. 19 of the Act of 1869, there might have been force in Mr. Carr's contention ; but so far from the evidence supporting that contention, the facts stated in the case shew that it was not under any misapprehension that the names of these persons were entered in the rate-book, but on the footing that they were, and with the intention of treating them as, the persons ultimately liable for the rates, which would only be lawful on the basis that they were the persons rated. Therefore that first contention fails.

The second contention fails also. It was said that these persons had not themselves paid the rate within the meaning of sub-s. 4 of s. 3 of the Act of 1867. It is true that they have not paid it with their own hands. In fact the owner made an arrangement under which his was to be the hand to pay. Mr. Carr

(1) [1911] 2 K. B. 1102 ; 2 Sm. Reg. Cas. 279.

contended that such an arrangement is not authorized by the Act of 1867. Possibly not. In my view it is not necessary to decide that question one way or the other, because s. 7 of the Act of 1869 contemplates a payment by the hand of the owner, whether under an agreement with the overseers or with the occupier, and enacts that it shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon payment of the poor rate. The case does not expressly state that the owner and occupier agreed that the owner should pay the rates, but the facts which are stated necessarily imply such an agreement, because the owner, who was the landlord, having agreed with the rating authorities to pay the rate for his tenant, that fact would be taken into account in fixing the rent. Therefore a payment of the rate by the owner would, in the absence of evidence to the contrary, be a payment by the owner under an agreement with the occupier. It follows that the appellant and the others complied with both conditions 3 and 4 of s. 3 of the Act of 1867; the case of *Kent v. Fittall* (1) is distinguishable on both these cardinal points, and this appeal must be allowed.

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LUSH J. I agree. I cannot help thinking that the real cause of the dispute in this case was the form of the agreement entered into between the owner and the rating authorities. The revising barrister inferred that the effect of that agreement was to place these claimants in the same position as the claimants and persons objected to in *Kent v. Fittall*. (1)

The owner, acting under s. 211 of the Public Health Act, 1875, applied to be rated to the general district rates, and agreed to pay those rates whether the tenements were occupied or unoccupied. In pursuance of this agreement he in fact paid the district rates upon half the rateable value. The agreement contained a further promise by him that, if his application was granted, as it was, he would pay the water charges and the poor rate for the premises in full as long as they were occupied; and he paid the poor rate from time to time under this agreement. He never applied to be put, and never was put, on the rate-book as the rated occupier of

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these premises; he simply entered into an agreement under which he assumed a responsibility as guarantor or surety for the occupier for the payment of these rates. That is the whole effect of this agreement. The revising barrister held that the appellant was not a rated occupier within the Representation of the People Act, 1867, the rateable value being over 8*l.*, namely, 12*l.*, and that this case was covered by the decision of the Court of Appeal in *Kent v. Fittall*. (1)

What were the facts? The appellant was the inhabitant occupier, and he was rated as such. I cannot see how in the face of those facts the revising barrister could have come to the conclusion that he was not the rated occupier. Mr. Carr's real point is that the owner in fact paid the rate. He admitted that the payment was made on behalf of the occupier; indeed he could not have done otherwise, seeing that an agreement between the owner and the occupier that the former shall pay the poor rate for the latter is the necessary inference from the facts stated in the case. It is true that the only agreement actually stated is that between the owner and the rating authorities; but that was obviously the outcome of an arrangement between him and the occupier. Then why is the appellant not entitled to be registered? Mr. Carr's answer is that the question is concluded by *Kent v. Fittall*. (1) I cannot agree. The facts in *Kent v. Fittall* (1) differed in all material respects from those in the present case. There the tenements in question, separate tenements, although parts of one building, were not on the rate-book at all; the claimants and persons objected to were not rated in respect of them; and therefore the two material facts which are present in this case were absent in the case of *Kent v. Fittall*. (1)

It is true that at the end of his judgment Vaughan Williams L.J. uses words which Mr. Carr claims in favour of his argument. The words are these: "It has been suggested to us that the effect of that Act"—i.e., the Parliamentary and Municipal Registration Act, 1878—"is that, although the provisions of s. 3 of the Act of 1867 have not been complied with, we are to deem that the landlord has paid the rates instead of the occupier." Then, after

(1) [1911] 2 K. B. 1102; 2 Sm. Reg. Cas. 279.

citing s. 7 of the Act of 1867, the Lord Justice proceeded thus :
“ The result of that section is that it is quite impossible in this case, in which no rate has been made upon or paid by the occupier, for the occupier to claim to be entitled to this franchise.” Inasmuch as no rate had been made at all in that case in respect of the only tenement that was material, it is obvious that no rate could be paid in respect of it, and all that I understand the Lord Justice to mean when he says that no rate was paid by the occupier is that, no rate having been made in respect of that tenement, the occupier never paid any rate in respect of it. In the present case the rate was paid on behalf of the occupier in respect of the tenement in question. Therefore, there being no similarity between *Kent v. Fittall* (1) and the present case, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Bull & Bull.*

Solicitors for respondents: *Wedlake, Letts & Birds, for Bickerton H. Deakin, Monmouth.*

(1) [1911] 2 K. B. 1102; 2 Sm. Reg. Cas. 279.

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Nov. 8.

CHESTERTON v. GARDOM.

Parliament—Service Franchise—Occupation—Payment of Rates—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 7, sub-s. 2—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3—Representation of the People Act, 1884 (48 & 49 Vict. c. 3), ss. 2, 3, and 9, sub-s. 8.

A servant inhabited a dwelling-house by virtue of his service. The master was rated for and paid the rates of the dwelling-house :—

Held, that the servant was entitled under ss. 3 and 9, sub-s. 8, of the Representation of the People Act, 1884, to have his name placed on the parliamentary list of voters in respect of the service franchise, inasmuch as the general enactment contained in s. 7 of the Representation of the People Act, 1867, requiring the occupier of a dwelling-house to be rated instead of the owner, and the exceptions thereto contained in sub-s. 2 of that section and s. 3 of the Poor Rate Assessment and Collection Act, 1869, did not apply.

CASE stated by the revising barrister for the Tewkesbury Division of the county of Gloucester.

At a Court held for the revision of the lists of voters for the Northern or Tewkesbury Division of the county of Gloucester on October 2, 1911, the appellant, John Chesterton, claimed to have his name inserted as an elector in division 2 of the occupiers' list of electors in respect of the occupation of property in the parish of Swindon as follows :—

Name of Claimant in full, surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Chesterton, John .	The Hall Lodge, Swindon	Dwelling - house (Service)	The Hall Lodge.

The appellant's employer, Mr. Moxon, of Swindon, was rated for the Hall Lodge and paid the rates.

Apart from the effect of this fact, it was admitted that the claim was good.

Objection was taken to the claim on the ground that the appellant was neither rated for the Hall Lodge nor paid the rates, and it was contended in support of the objection that the effect

of s. 7 of the Representation of the People Act, 1867 (1), is that, after the passing of that Act, no owner is to be rated instead of the occupier, except where, as stated in s. 7, sub-s. 2, the dwelling-house or tenement is wholly let out in apartments or lodgings, with the further exception which was introduced by the Poor

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(1) Representation of the People Act, 1867, s. 7:

"Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"1. After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier, except as herein-after mentioned:

"2. The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate book.

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate. . . ."

By s. 3 of the Poor Rate Assessment and Collection Act, 1869, the owners of hereditaments of certain rateable values may agree with the overseers to pay the poor rates whether the hereditaments are occu-

pied or not and to be allowed a commission not exceeding 25 per cent. on the amount thereof.

Representation of the People Act, 1884, s. 3: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant."

Sect. 9, sub-s. 8: "Where a man inhabits any dwelling-house by virtue of any office, service, or employment, and is deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant, and another person is rated or liable to be rated for such dwelling-house, the rating of such other person shall for the purposes of this Act and of the Representation of the People Acts be deemed to be that of the inhabitant occupier; and the several enactments of the Poor Rate Assessment and Collection Act, 1869, and other Acts amending the same referred to in the First Schedule to this Act shall for those purposes apply to such inhabitant occupier, and in the construction of those enactments the word 'owner' shall be deemed to include a person actually rated or liable to be rated as aforesaid."

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Rate Assessment and Collection Act, 1869, s. 3, under which owners may agree to pay the rate and be allowed a commission.

The appellant, it was argued, did not bring his case within either of the exceptions, and therefore the general enactment of s. 7 of the Representation of the People Act, 1867, providing that the occupier must be rated to the poor rate, applied.

It was pointed out that, although s. 7 of the Act of 1867 in terms applies to boroughs, now, by the Representation of the People Act, 1884, s. 2, a uniform household franchise is established in all boroughs and counties.

In support of the claim it was contended that by the express terms of s. 9, sub-s. 8, of the Representation of the People Act, 1884, where a person inhabits a dwelling-house by virtue of any office, service, or employment, as the appellant does, and another person is rated, as in his case, the rating of such other person is deemed to be that of the inhabitant occupier—that is the appellant—so that the occupier is rated as required by s. 7 of the Representation of the People Act, 1867.

In reply to this contention it was argued, in support of the objection, that “another person” in s. 9, sub-s. 8, of the Representation of the People Act, 1884, must mean a person coming within one of the two exceptions to the general enactment of s. 7 of the Representation of the People Act, 1867, which requires that the occupier and not the owner shall be rated.

The revising barrister was of opinion that the contention in support of the objection to the claim was correct, and the objection fatal, and he therefore disallowed the claim.

If the Court should be of opinion that the decision was wrong, the register was to be amended by inserting the name of the appellant as an elector in division 2 of the occupiers' list of electors of the parish of Swindon.

Dalry, for the appellant. The revising barrister was wrong. The history of the service franchise is as follows: By s. 3 of the Representation of the People Act, 1867, the franchise was given to the inhabitant occupier of a dwelling-house who had been rated and had paid rates during the qualifying period. The service franchise came into existence by the operation of s. 3 of

the Representation of the People Act, 1884, which enacts that where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom the man serves, he shall be deemed for the purposes of the Representation of the People Acts to be an inhabitant occupier of the dwelling-house as a tenant. Therefore the servant was put into the position of obtaining the franchise under the Act of 1867. Sub-s. 8 of s. 9 of the Act of 1884 enacts that where a man is so deemed to be an inhabitant occupier, and another person is rated or liable to be rated for the dwelling-house, the rating of the other person shall for the purposes of the Representation of the People Acts be deemed to be that of the inhabitant occupier, and the several enactments of the Poor Rate Assessment and Collection Act, 1869, referred to in the First Schedule to the Act of 1884, shall for those purposes apply to such an inhabitant occupier, and in the construction of those enactments the word "owner" is to include a person actually rated or liable to be rated as aforesaid. By s. 19 of the Poor Rate Assessment and Collection Act, 1869, which is included in the First Schedule to the Act of 1884, the overseers in making out the poor rate are to enter the occupier's name in the occupiers' column, and the occupier is then to be deemed to be rated. And by s. 7 of the Act of 1869, which is also included in the First Schedule to the Act of 1884, every payment of a rate by an owner is to be deemed to be payment by the occupier for the purpose of any franchise depending on the payment of the poor rate.

The result is that the servant is put into the position of having the franchise of the inhabitant occupier. The revising barrister has lost sight of the fact that a servant cannot be rated: *Rex v. Inhabitants of Tynemouth*.⁽¹⁾ The effect of ss. 3 and 9, sub-s. 8, of the Representation of the People Act, 1884, is that the master is put into the position of an owner and the servant into the position of an occupier, and it follows from s. 7 of the Poor Rate Assessment and Collection Act, 1869, that payment of rates by the owner is to be considered to be payment by the occupier. The language of the Act of 1884

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(1) (1810) 12 East, 46.

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completely covers the case of the service occupier, and the effect of that statute upon the Act of 1869 is that the word "owner" in that Act must be read as including a person in the position of a master.

Sect. 7 of the Representation of the People Act, 1867, which enacts that no owner of a dwelling-house shall be rated instead of the occupier except where it is wholly let out in apartments or lodgings not separately rated, does not apply to the case of a service voter. It only applies where there is an owner and an occupier. In the present case the appellant is not the occupier, but is only deemed to be the occupier for the purposes of the franchise; Mr. Moxon is the occupier by his servant, the appellant. The section merely relates to the law of rating. It enumerates the cases in which the owner may properly be rated instead of the occupier. The decision of the revising barrister if upheld would abolish the service franchise. [*Kent v. Fittall* (1) was also referred to.]

The respondent (the clerk to the Gloucestershire County Council) did not appear.

DARLING J. In this case the appellant claimed that his name should be placed on the register in respect of the service franchise. [Having stated the facts, the learned judge continued:] The effect of s. 9, sub-s. 8, of the Representation of the People Act, 1884, is that the rating of Mr. Moxon is to be deemed to be the rating of the appellant, who occupies the Hall Lodge, unless the contention which the revising barrister upheld, namely, that the words "another person" in the sub-section mean a person coming within one of the two exceptions to the general enactment of s. 7 of the Representation of the People Act, 1867, is right. In my judgment s. 7 of the Act of 1867 and the exceptions to it do not apply to the present case. Sect. 7 of the Act of 1867 only applies where the owner is rated instead of the occupier. But Mr. Moxon is not rated here instead of the occupier; he is rated because he is not only the owner, but also the occupier. It is quite true that he occupies by means of the appellant. The appellant in fact occupies, but in law Mr. Moxon occupies by means of his

(1) [1911] 2 K. B. 1102.

servant. Therefore in my view s. 7 of the Representation of the People Act, 1867, and the two exceptions which are relied upon as depriving the appellant of this franchise do not apply. The appellant absolutely comes within the terms of ss. 3 and 9, sub-s. 8, of the Representation of the People Act, 1884, and is therefore to be deemed to be a rated occupier. His claim to have his name placed upon the register is a good one, and the appeal must be allowed.

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HAMILTON J. I am of the same opinion.

BANKES J. I agree.

Appeal allowed.

Solicitors for appellant: *Bull & Bull.*

J. E. A.

[IN THE COURT OF APPEAL.]

STODDART v. UNION TRUST, LIMITED.

C. A.

1911
Oct. 24.

Assignment of Chose in Action—Contract induced by Fraud of Assignor—Action by Assignee—Equity entitled to Priority over the Right of the Assignee—Damages against Assignor for Fraud—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.

The defendants entered into a contract for the purchase of a newspaper for a sum of 1000*l.*, of which 200*l.* was paid on the completion of the contract, and the balance of 800*l.* was to be payable by certain instalments. The defendants were induced to enter into the contract by fraudulent misrepresentations made to them by the vendor. The vendor for valuable consideration assigned the balance of the purchase-money by deed absolutely to the plaintiff, and notice in writing of that assignment was given to the defendants. The plaintiff at the time of that assignment had no notice of the fraud on the part of the vendor. In an action by the plaintiff against the defendants for the debt of 800*l.* so assigned, the defendants pleaded, by way of defence, in substance, that they were induced to enter into the contract for the purchase of the newspaper by the fraud of the vendor, and that by reason thereof they had sustained damage exceeding 800*l.*, and no money was due from them at the date of the assignment to the plaintiff, and, in the event of their being held liable to pay the sum claimed by the plaintiff, they counterclaimed against the vendor damages for fraud to an equal

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amount. (1) The defendants were not in a position, and did not claim, to rescind the contract for the purchase of the newspaper. At the trial the jury found that the defendants had been induced to enter into the contract for purchase of the newspaper by the fraud of the vendor, and had thereby sustained damage to the amount of 800*l*. The judge on those findings gave judgment for the defendants on the plaintiff's claim and judgment for the defendants against the vendor for 800*l*. damages upon the counter-claim, but stayed execution on the latter judgment:—

Held, upon the above-mentioned facts, that the defendants could not set up the claim to 800*l*. damages for the fraud of the vendor by way of defence against the claim of the plaintiff, and that the plaintiff was entitled to judgment against the defendants for 800*l*.

APPLICATION by the plaintiff for judgment or a new trial in an action tried by Bucknill J. with a jury.

The action was brought by the plaintiff to recover from the defendants the sum of 800*l*., as being the balance remaining unpaid of an amount agreed to be paid by the defendants for the purchase of a newspaper called *Football Chat* under a contract dated July 2, 1908, and made by the defendants with one Price. By that contract Price sold the newspaper to the defendants, who purchased it with a view to its being ultimately transferred to a company to be formed under the name of "Football Chat, Limited," for the purpose of carrying on the paper. The agreed purchase-money was 1000*l*., of which 200*l*. was paid on completion of the contract, and the balance was to be payable by successive instalments of 200*l*. The proposed company was subsequently formed under the name of "Football Chat, Limited," some of the shareholders in it being also shareholders in the defendant company. The paper was transferred to Football Chat, Limited, by the defendants for a sum of 1800*l*., to be payable as to 1000*l*. in cash, and as to 800*l*. in shares. The balance remaining due from the defendants to Price as before mentioned was by deed dated September 4, 1908, assigned absolutely by Price to the plaintiff for valuable consideration, of which assignment notice was on the same day given in writing to the defendants. Football Chat, Limited, carried on the paper for about ten months, and then went into voluntary liquidation, and it was stated that

(1) For the circumstances under which this so-called counter-claim was allowed to stand, see the body of the report on p. 183.

on that liquidation the paper was sold for 100*l*. They had refused to pay to the defendants the before-mentioned sum of 1000*l*. for the newspaper on the ground that the property was not as represented by Price.

The defendants by their statement of defence pleaded as follows. Paragraphs 3 to 9, inclusive, of the defence stated, in substance, that Price had induced the defendants to enter into the contract for the purchase of the newspaper by representing to them that the circulation of the paper averaged 25,000 per week and its advertisement revenue averaged 1040*l*. annually, whereas its circulation averaged only about 12,000 per week, and the advertisement revenue only about 500*l*. a year, and that the said representations were made by Price fraudulently; and paragraph 10 stated that by reason of the premises the said newspaper was worthless, or not worth more than the 200*l*. paid upon the completion of the contract, and that the defendants claimed a declaration that no further moneys were payable under the contract. The defendants also counterclaimed against the plaintiff and Price, who was joined as defendant to the counter-claim, repeating in their counter-claim paragraphs 3 to 10, inclusive, of their statement of defence, and, in the event of their being held liable to discharge the sums payable under the before-mentioned contract, claiming by way of damages a sum equal to the amount so payable under the said contract.

On an application by the plaintiff to a Master at chambers, he ordered the counter-claim as against Price to be struck out. On appeal to the judge at chambers, he ordered that the Master's order should be varied by striking out the counter-claim as against the plaintiff only, and allowing the counter-claim as against Price to stand. There was no appeal against the judge's order. (1) The action so constituted proceeded to trial, and at the trial the jury found, in answer to questions left to them by the learned judge, that Price did make the alleged representations to the defendants, that they were false and made recklessly without belief in their truth, and that the defendants were damaged by them to the amount of 800*l*. It was not alleged in the pleadings,

(1) It will be observed that the actions between different parties were result of this was that two distinct amalgamated and tried together.

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or suggested by counsel at the trial, that the plaintiff had, at the time of the assignment of the balance of the purchase-money to him, notice of any fraud on the part of Price which induced the defendants to enter into the contract for the purchase of the newspaper. Upon the findings of the jury the learned judge on further consideration gave judgment for the defendants, the Union Trust, Limited, on the claim, and judgment for them against Price for 800*l.* damages on the counter-claim, but stayed execution on the latter judgment until it should appear what happened in respect of the judgment against the plaintiff. He declined to make the declaration asked for in paragraph 10 of the defence on the ground that such a declaration was matter, not of defence, but of counter-claim, and by the judge's order not appealed against the counter-claim as against the plaintiff had been struck out, but he gave leave to the defendants, the Union Trust, to make any amendment of their defence, as distinguished from their counter-claim, which might be open to them upon the facts as found by the jury. The defendants accordingly amended paragraph 10 of their defence by pleading, in substance, that, by reason of the matters alleged in paragraphs 3 to 9 of the defence, inclusive, and of the said fraud of Price, the Union Trust, Limited, sustained damage exceeding the sum of 800*l.*, and no money was due from them to Price on September 4, 1908, or had since become due, and the contract of July 2, 1908, was not enforceable against the Union Trust, Limited, by Price on September 4, 1908, or at the date of the writ, and was not enforceable against them by the plaintiff. During the argument the counsel for the defendants stated that, under the circumstances, the defendants did not claim to avoid the contract of July 2, 1908.

Abinger (*Scott-Fox*, K.C., with him), for the plaintiff. On the undisputed facts the plaintiff, who gave value for the debt assigned without notice of any fraud on the part of Price, is entitled to judgment for 800*l.* against the Union Trust.

[He was stopped by the Court, who called on:—]

Clavell Salter, K.C., and *A. Cairns*, for the defendants, the Union Trust, Limited. The defendants do not make any claim to rescind the contract for sale of the newspaper to them. Apart

from any such claim, they have a good defence. The authorities shew that a claim against the assignor of a debt for unliquidated damages arising out of, or connected with, the same contract or transaction as that out of which the debt arises may be set up by the debtor by way of defence to an action against him by the assignee of the debt: see *Young v. Kitchin* (1); *Government of Newfoundland v. Newfoundland Ry. Co.* (2); *Mangles v. Dixon*. (3) The findings of the jury shew that through the statements made by Price the defendants were induced to buy a subject-matter which, by reason of the untruth of those statements, was worthless in their hands, or only worth the 200*l.* which had already been paid for it. They had, therefore, a cause of action against Price which would, in effect, have prevented him from recovering the balance of the purchase-money from them, and which accrued before the date of the assignment of that balance to the plaintiff. That claim comes within the words of Lord Hobhouse in delivering the judgment of the Privy Council in *Government of Newfoundland v. Newfoundland Ry. Co.* (4), where he said that "unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment." Here the claim to the damages as against Price flows out of, and is inseparably connected with the dealing or transaction that gave rise to the debt which was assigned to the plaintiff.

[BUCKLEY L.J. In *Government of Newfoundland v. Newfoundland Ry. Co.* (2) what was sought to be set off against the assignees was a claim for breaches of the very contract out of which the debt arose, and therefore one which would affect the amount due under and in respect of the contract.]

The assignee of a chose in action, as a general rule, though without notice, takes it subject to all the equities which subsist against it: see note to *Ryall v. Rowles*, White and Tudor's Leading Cases in Equity, 8th ed., 142. The assignee of a debt

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(1) (1878) 3 Ex. D. 127.

(3) (1852) 3 H. L. C. 702.

(2) (1888) 13 App. Cas. 199.

(4) 13 App. Cas. at p. 213.

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stands for this purpose in the shoes of the assignor, and is affected by any equity which existed in favour of the debtor as against the assignor at the time of the notice of the assignment of the debt to the debtor, and which arose out of the transaction that gave rise to that debt. The Judicature Act, 1873, s. 25, sub-s. 6, makes an assignment of a debt thereunder "subject to all equities which would have been entitled to priority over the right of the assignee."

[BUCKLEY L.J. The sub-section says that the assignment shall be subject to all equities which would have had priority over the right of the assignee, "if this Act had not passed."]

The debtors here would, prior to the Act, have been entitled in equity, in priority to the right of the assignee, to have the amount of the debt diminished or cancelled to the extent to which the value of the subject-matter of the contract of sale under which the debt arose was diminished by reason of the untruth of the representations fraudulently made to them by the vendor. The defendants do not seek to say that there is no contract for the sale of the paper to them. They say that, though there is such a contract, there is a claim against the assignor of the debt flowing out of and inseparably connected with that contract so as to entitle the debtors to set it up in answer to the claim made by the assignee of the debt. The substance of the case is that the subject-matter of the contract of sale, which was fraudulently represented to be of a certain value, was really worth nothing, or, at any rate, not more than the 200*l.* already paid, and therefore nothing is really due from the purchaser to the assignor, and for this purpose his assignee must stand in his shoes, even although he has given valuable consideration for the assignment without notice of the fraud. If there had been a clause in the contract of sale warranting that the average profits of the paper were as stated, and they were not, clearly the debtors could have set that up in answer to the claim of the assignee of the debt. It is submitted that that case is really analogous to the present. A Court of Equity would under the circumstances of this case have refused to enforce the contract which was procured by the fraud of the assignor at the suit of the assignee of the debt. [They also

cited *Graham v. Johnson* (1) ; *Turton v. Benson* (2) ; *Roxburghe v. Cox* (3) ; *Scholefield v. Templer*. (4)]

Scott-Fox, K.C., for the plaintiff, was not called upon to reply.

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VAUGHAN WILLIAMS L.J. There was evidence in this case to shew that the contract giving rise to the debt, which was the subject-matter of the assignment to the plaintiff, was one into which the defendants had been induced to enter by fraudulent misrepresentations. A number of questions were asked of the jury, but no question was put to them as to whether the plaintiff at the time of the assignment of the debt to him had notice of the fraudulent representations which led to the contract being made. That question was not raised on the pleadings and does not seem to have been discussed at the trial ; and counsel never asked to have any such question put to the jury. Therefore, I think, we must, in the absence of any finding of knowledge by the plaintiff of the fraud by which the contract was induced, deal with this case on the footing that the plaintiff was an innocent assignee of this debt for value. The question then arises whether, under these circumstances, there is, upon the findings of the jury, anything, either in law or equity, which prevents the plaintiff from maintaining his action for the debt assigned to him. I feel myself obliged by the authorities on the subject to say that there is nothing to prevent him from doing so.

The question to a great extent depends upon the Judicature Act, 1873, s. 25, sub-s. 6, which provides that "any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt, or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or

(1) (1869) L. R. 8 Eq. 36.

(2) (1718) 1 P. Wms. 496.

(3) (1881) 17 Ch. D. 520.

(4) (1859) John. 155.

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chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor." That enactment does away with the difficulty which formerly existed, namely, that a chose in action was not assignable at law, and therefore the assignee of a chose in action could not sue at law in respect of it in his own name, but only in the name of his assignor. In equity he was allowed to sue in his own name, and in such a suit the defendant was allowed to set up some of the defences which would have been available to him as against the assignor, but a Court of Equity would not allow him to set up any defence or set-off arising as between him and the assignor subsequently to the notice of the assignment out of matters not connected with the chose in action assigned. It appears to me that, although the words of s. 25, sub-s. 6, "subject to all equities," &c., may not, perhaps, be very happily chosen, the result is that an assignee of a debt could not, under the circumstances of this case, have been restrained in equity from proceeding to enforce the debt, if he were an assignee of it for value and without notice of any fraud. That seems to me to be the result of the authorities. I confess that I give effect to them here with some reluctance. I hoped at one time that in the judgments in *Young v. Kitchen* (1) and *Government of Newfoundland v. Newfoundland Ry. Co.* (2) I had found sufficient to enable me to say that the assignee of the debt in the present case so far stood in the shoes of the assignor that the defendants could rely by way of defence on the fraud of the assignor which led them to enter into the contract. But on further consideration I do not think I can say that under the circumstances of this case for the following reasons. In *Young v. Kitchen* (1) Cleasby B. lays down the limitations of the right of the debtor to set up claims against the assignor by way of defence to an action by the assignee of the debt thus: "The Judicature Act, 1873, s. 25, sub-s. 6, says that the assignment of a debt or other legal chose in action shall be 'subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not

(1) 3 Ex. D. 127.

(2) 13 App. Cas. 199.

passed,' that is subject to all equities which could be enforced in a Court of Equity." It would not be true upon the authorities, I think, to say that in a Court of Equity the debtor could never in such cases set up against the assignee of a debt a defence based upon fraud of the assignor by which he, the debtor, was induced to enter into the contract which gave rise to the debt assigned. I think that a debtor sued by the assignee of a debt might set up the defence that the contract under which the debt arose ought to be set aside and cancelled on the ground of fraud, but whether that could have been done in the present case is immaterial, for the defendants have not sought to do that, for the reason that they have so acted with regard to the subject-matter the sale of which was the consideration for the debt that they could not repudiate the contract. The question is whether, under these circumstances, the defendants here are in such a position that they cannot rely on the fraud of the assignor, and I am of opinion that they cannot. I come to that conclusion with some reluctance, because I doubt whether it is entirely consistent with justice that an assignee of a chose in action, even if innocent, should be allowed under such circumstances as these to recover without regard to the fraud of the assignor. The decisions in cases like *Young v. Kitchen* (1) and *Government of Newfoundland v. Newfoundland Ry. Co.* (2), which were cases where a contract involved the performance of work by one of the parties to it in the future, and the consideration for the sum to be paid under it was the performance of that work in accordance with the contract, shew that matters flowing out of, and inseparably connected with, the contract which gave rise to the chose in action assigned may be set up by way of defence as against an assignee suing in respect thereof. I come, however, with some regret to the conclusion that the principle of those decisions cannot be applied in the present case. I think, therefore, that the judgment against the plaintiff must be set aside, and judgment entered for him against the defendants for 800/.

BUCKLEY L.J. From much confusion in this case one thing to my mind stands out clearly, and that is that the judgment

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under appeal cannot possibly in its integrity be maintained. Price had sold property to the Union Trust for a sum of money, of which a balance of 800*l.* was in September, 1908, unpaid, and payable by certain instalments. He assigned that debt to Stoddart for value. Notice of the assignment was given to the debtors. As from that moment Price ceased to be, and Stoddart became the owner of that debt of 800*l.*, if there was such a debt. Stoddart brought his action against the Union Trust to recover that debt, and the judgment under appeal affirms that the plaintiff Stoddart is to recover nothing against the defendants, the Union Trust: in other words, it is found that there is no debt of 800*l.* If there is such a debt Stoddart owns it, and if he does not recover, it is because it does not exist. The judgment then goes on as against Price to hold that the Union Trust are entitled to 800*l.* damages, which must be because they are liable to pay Stoddart 800*l.* under the contract. The first part of the judgment, therefore, has affirmed that they are not liable to pay the 800*l.*; the second part affirms that they are entitled to recover 800*l.* because they are liable to pay it. Manifestly that is self-contradictory and impossible. The circumstances are these. Price sold a property to the Union Trust, having induced that sale by fraud. That is found by the verdict of the jury. Stoddart having brought his action, the Union Trust defended the action upon the ground of Price's fraud, seeking to attribute that to Stoddart. Stoddart is not alleged to have been any party to it; he had not been fraudulent, but Price had. In addition to defending the claim upon that ground, the Union Trust brought what was called a counter-claim, making Stoddart and Price defendants. It may be that they could have, and I will assume that they could have, brought an action against Price and Stoddart, claiming against both of them that, the contract having been induced by fraud, they, the Union Trust, were entitled to set it aside. They might or might not have succeeded in such a counter-claim, but that was not the counter-claim which they brought. The counter-claim which they brought was one against Stoddart and Price for damages. Obviously there were no damages due from Stoddart for Price's fraud. Such a counter-claim was impossible. The matter having been brought before the judge

in chambers, he struck out the counter-claim as regards Stoddart, as being manifestly impossible, and the action went on with this so-called counter-claim against Price (which was not a counter-claim at all) standing, Stoddart suing to recover 800*l.* from the Union Trust, and the Union Trust suing Price for damages for fraud.

What has been argued before us as regards Stoddart's action is that, he being an assignee of the debt due from the Union Trust to Price, there could be set up as between him and the Union Trust all equities existing as between his assignor and the Union Trust at the date of the notice of the assignment by the assignor to the assignee. The argument at one moment seemed to go further, and to affirm that subsequent equities could be set up by the Union Trust. Manifestly that is impossible. Granting that equities existing as between the assignor and the Union Trust at the date of the notice of assignment could be set up, this particular equity, namely, the right to set aside the contract for fraud, has not been asserted in this action, and therefore it is immaterial to consider for the purposes of my judgment whether an action to set aside the contract on the ground of fraud would or would not have succeeded. No claim was made to set aside the contract. What the Union Trust did was to come into Court saying that they were liable under the contract to pay the 800*l.* and, because they were so liable, they were entitled to damages against Price for fraud. It is sought to say that they can avail themselves of this as a defence against Stoddart upon the ground that it was something arising out of the contract of which the purchase-money was the consideration. For the purposes of this judgment I will assume, without saying that the proposition is exhaustively true, that, where the assignee of a debt sues, the debtor may set up against the assignee all claims arising under the contract, or in respect of breaches of the contract, under which the debt assigned arose. There is authority for saying that any claim arising under the contract, or in respect of breaches of the contract, such as a builder's failure to supply proper materials, or such like, could be set up by way of set-off against the assignee of the debt due under the contract. The present case, however, is one in which the

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equity claimed is to repudiate the obligation under the contract on the ground that the contract was induced by fraud: in other words, it is sought to set off against the assignee, not something arising under the contract, or for breach of the contract, but a claim to repudiate all obligation under the contract, while not seeking to set aside the contract. Assuming that this might be done by way of repudiation of the contract, it is impossible for the debtor, where he comes into Court admitting the contract, and electing to be bound by it, and seeking to recover damages by reason of its existence, to set up a case in which the alleged equity is to repudiate obligation under it altogether. Stoddart, suing here as assignee, is not liable in damages at all; he has been guilty of no fraud. He is an assignee for value of a debt, and the only remaining question would be whether he was assignee for value without notice that at the date of the notice of the assignment there was an alleged equitable right in the Union Trust as against the assignor to set aside for fraud the contract under which the debt arose. I see with some surprise that in the judgment of the learned judge he appears to have discussed the question of knowledge of the fraud on the part of Stoddart. The existence of such knowledge, if it was to be a factor in determining this case, in the first place ought to have been pleaded, and it is not pleaded; and in the second place the question of its existence ought to have been determined by the verdict of the jury, if it had been pleaded, and had been raised at the trial. But, so far as I can make out, that question never was raised in the course of the trial, and no verdict was taken upon it. The counsel for the Union Trust very fairly said at the opening of the argument that he proposed to treat the case upon the footing that Stoddart was an assignee for value without notice. As I understand the law, Stoddart is entitled under these circumstances to say that he bought this debt without any knowledge that it was not what it purported to be, namely, a valid debt for 800*l.*, that the defendants have not sought as against him to set aside the contract under which it arose, which therefore stands, and that, the debt under it having been assigned to him, he is entitled to the judgment for which he asks. It appears to me that the judgment should be varied by

setting aside so much of it as is a judgment against Stoddart in favour of the Union Trust, and substituting for that a judgment for the plaintiff for 800*l*.

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KENNEDY L.J. In this case, after the judgments delivered by the other members of the Court, there is little which I think it incumbent upon me to add. Without referring to the history and conduct of the action, I desire simply to state why I think, after hearing the arguments addressed to us, that the case made on behalf of the Union Trust fails. There seems to be no doubt, upon the authority of the cases which have been cited to us, namely, *Young v. Kitchin* (1) and *Government of Newfoundland v. Newfoundland Ry. Co.* (2), that, where there is a claim arising out of the contract itself under which the debt arises, and the claim affects the value or amount of that which one of the parties to that contract has purported to assign for value, then, if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence as cancelling or diminishing the amount of that to which the assignee asserts his right under the assignment. That is laid down by Lord Hobhouse in delivering the judgment of the Privy Council in *Government of Newfoundland v. Newfoundland Ry. Co.* (3) He there said: "Unliquidated damages may now be set off as between the original parties, and also as against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment." In a previous passage of the judgment he had described the claims which in that case were successfully set up against assignees as claims which had "their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner." The claim which it is sought to set up here as an answer to the plaintiff Stoddart's claim is, as it seems to me, really not a claim which can be said to arise out of the contract in question at all; it is a claim for damages in respect of fraud which induced the defendants, the Union Trust, to enter into that contract. That is strictly a personal

(1) 3 Ex. D. 127.

(2) 13 App. Cas. 199.

(3) 13 App. Cas. 199, at p. 213.

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claim against the man Price, who committed an actionable wrong in so inducing the Union Trust to enter into the contract. I do not think that this claim comes within the category of claims arising out of the contract sued upon which the person sued by the assignee of a chose in action may set up for his protection, either complete or partial, against the assignee's claim. On the contrary it is a claim for damages for having been induced to enter into a contract, which the defendants, who are sued by the assignee, are asserting to be an existent and still binding contract. The defendants are claiming damages for the fraud which induced them to enter into the contract on the footing that they are liable under it, and at the same time seeking to repudiate their obligation under it. The claim for damages is a personal claim against the wrong-doer; it is something dehors the contract, and I do not think that it can be truly said to come within the reasoning of those judgments to which I have referred, and which, so far as claims arising out of the contract itself are concerned, pronounce that the Judicature Act may be interpreted as giving the party sued by the assignee of a chose in action a right to set off such claims, so as to diminish or wipe out the claim of the assignee. It is not as if the party wronged by having been induced to enter into a contract by fraud had in such a case no remedy. He has his remedy by action against the assignor. That remedy the Union Trust have in this case pursued, and recovered judgment against Price for damages on the footing that the contract subsists and is still binding upon them. Under those circumstances I do not think that we are entitled to take into consideration either the probability or improbability of the judgment which has been given in this case against Price ever being satisfied. It seems to me, upon authority and in principle, however it may work out in a particular case, to be just that the parties defrauded should look for a remedy for the wrong done to them by the person who induced them to enter into the contract to the party who did the wrong, and that the innocent assignee of the contract, which they assert to be still subsisting, should have the benefit which they stipulated by the contract to give to the assignor. If the case had been one in which the defendants were

entitled to elect, and had elected, on the ground of fraud, to cancel and rescind the contract, and treat it as void, then, I think, a different position might have arisen, but the defendants here have not claimed to do any such thing.

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Application allowed.

Solicitors for plaintiff: *Alpe & Ward.*

Solicitors for defendants: *Romer & Skan.*

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Insurance (Life)—Condition—Breach—“ Assurance shall be void and the premiums paid shall be forfeited ”—Premiums paid after Breach.

By a condition indorsed on a policy of life insurance, effected in 1894, it was provided that, if the assured should go beyond the limits of travel therein specified without obtaining licence from the insurers, “ the assurance shall be void and the premiums paid shall be forfeited.” The assured in 1897, either not having read the terms of the condition or having forgotten them, went for a short time beyond the specified limits of travel without the licence or knowledge of the insurers. The assured continued to pay the premiums until the beginning of 1911, when he discovered that he had in 1897 committed a breach of the condition, and informed the insurers thereof. In an action by him to recover back the premiums paid since 1897 upon the ground that by reason of the breach of the condition the policy had become void as from that date :—

Held, that, even assuming that the policy had become void upon the breach of the condition, the premiums paid since that date had become forfeited, and the assured was not entitled to recover them back.

TRIAL of action before Bray J. without a jury.

The action was to recover back certain moneys paid as premiums on four policies of life insurance on the ground that the policies were void, or in the alternative for a declaration that the policies were valid and worldwide.

The plaintiff, a merchant in London, in 1894 signed a proposal with a declaration attached for an insurance on his life with the

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defendants for 10,000*l.*, in which he stated that he had been in Calcutta in the years 1869 to 1892, and that he had no intention or prospect of going abroad. The defendants issued four policies dated June 7, 1894, each for 2500*l.*, to the plaintiff on his life, the premiums thereon being payable half-yearly in June and December of each year. The following clause was contained in the body of the policies :—" Provided always that if the assured shall commit suicide within thirteen months from the date of this policy, or if in the said proposal or the declaration appended thereto any information has been withheld, or any of the matters set forth have not been truly and fairly stated, then and in either of such cases this policy shall be void, and all moneys paid on account of this assurance shall be forfeited ; but nothing contained in this proviso shall prejudice or affect the privileges hereby conferred in cases where for an onerous cause a policy has been bona fide effected by one person on the life of another, or has been bona fide assigned to a third party." Each of the policies was made subject to the conditions specified on the back thereof. By condition 6, "In time of peace the assured may travel or reside in any part of the world (except Asia) north of 35° north latitude, or south of 30° south latitude ; in Natal or in Madeira ; may visit Egypt and Palestine between 1st November and 1st April ; and may also, if not engaged in a seafaring occupation, voyage in first class vessels from one place within the above limits to another such place ; but if the assured shall go beyond those limits (except in making a direct voyage from one place to another as above stated) or shall engage in a seafaring occupation without obtaining licence from the company, the assurance shall be void, and the premiums paid shall be forfeited. If the policy shall have been effected bona fide on the life of another, or be bona fide held by a third party as assignee for an onerous cause, it shall not be void under this condition, provided any extra risk incurred by the assured be intimated to the company as soon as it becomes known to the holder of the policy, and the extra premium fixed by the directors be at same time paid." Condition 7 : " If during the first five years from the date of commencement of the policy no extra premium shall have been

incurred, and the assured shall not have been engaged in naval or military service nor in a seafaring occupation, the assured shall be at liberty, after the expiry of the said period, to travel or reside in any part of the world, or to engage in any occupation, without obtaining licence from the company." In the spring of 1897 the plaintiff went on a voyage to India and back, stopping eight days at Calcutta. He did not obtain the licence of the defendants for that purpose, being unaware that he was exceeding the limits of travel allowed by the policy, as either he had never read condition 6, or if he had read it he had forgotten it. This voyage was unknown to the defendants. The plaintiff paid the premiums on the policies each half-year down to and including that due in December, 1910, and in February, 1911, he became desirous of selling the policies, and the proposed purchaser raised a question as to their being worldwide and free from restrictions. The plaintiff then became aware of the terms of condition 6, and on February 11 he wrote to the defendants stating that in 1897 he made a journey to India and back, and thus unwittingly exceeded the limits of travel during the first five years of the policies, and asked them to indorse the policies as worldwide and free from restrictions. On February 14 the defendants' secretary wrote in reply that "it would appear that, as you went abroad in 1897 without obtaining licence from the company, your policies are strictly speaking void"; that if he had asked for their licence at the time the extra premium for the short trip would have been 25*l.*, and they were inclined to think that they should be paid that sum with compound interest, but before they said definitely and before they decided whether the policies could be made worldwide they would like to be quite sure that he had no intention of going to India again. In a further letter of February 21 the defendants' secretary again wrote to the plaintiff that it would be unfair to other policyholders paying Indian extras if they were to waive payment of the 25*l.* and interest simply because he had omitted to advise them at the time of the trip, and continued: "The extra 25*l.* accumulated at 4 per cent. interest would amount to say 42*l.*, and this sum should be paid to us now. As we previously informed you, the policies are strictly speaking void, but we are

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prepared to revive them and make them worldwide on payment of the arrears of extra premium and interest as above mentioned." On February 22 the plaintiff's solicitors wrote to the defendants as follows: "We have to-day been consulted by Mr. J. L. Sparenborg with reference to the above policies on his life, and in view of the contents of your letters dated 14th and 21st inst. respectively and on the footing that the policies are, as you therein state, void as from 1897, and therefore the premiums paid thereunder should be refunded with accumulated interest at 4 per cent., we are instructed to request such refund, and we await to hear further from you on the matter." On March 1 the defendants' secretary wrote in reply saying that it had been thought desirable to submit the whole matter to the directors, and proceeded: "There can be no doubt that Mr. Sparenborg should have given us formal notice of his proposed trip to India, and his neglect to do so made the policies liable to be declared void. Apparently however Mr. Sparenborg's health in no way suffered from the trip, and, keeping all the circumstances in view, the directors came to the conclusion that they might make a concession in his favour and waive any claim for foreign extra premium." On the following day the plaintiff's solicitors wrote to the defendants as follows: "We have seen our client upon your favour of yesterday's date, which we should point out is scarcely a reply to our letter of 22nd ult., and we are instructed to say that our client does not see his way to adopt the suggestion you make as a settlement of his claims"; and in a further letter to the defendants of March 10 the plaintiff's solicitors formally demanded repayment of the sums paid by the plaintiff to them since 1897, amounting to 5664*l.* 5*s.* 11*d.* On March 13, 1911, this action was commenced, the plaintiff claiming repayment of the above-named sum as money had and received by the defendants to the use of the plaintiff, upon the ground that the policies became void in February, 1897, or became voidable at the option of the defendants, and the defendants by the letters of February 14 and 21, 1911, declared the policies void.

The defendants in their defence, so far as material to this report, said that, if the policies became void in February, 1897, or at any other date, the premiums paid since that date became

forfeited under condition 6 of the policies, and the plaintiff had no cause of action in respect thereof.

Upon October 21 the plaintiff amended the statement of claim by adding an alternative claim for a declaration that the policies were valid and effective and worldwide; and the defendants in answer thereto pleaded that before the commencement of the action by their letter dated March 1, 1911, they intimated to the plaintiff that they were ready and willing to treat the policies as valid and worldwide, and were still ready and willing to do so, and that the plaintiff was not entitled to the declaration claimed.

Gore-Browne, K.C., and *Austin Farleigh*, for the plaintiff. Upon breach of condition 6 the policies became ipso facto void as from the date of the breach. There is a dictum to this effect in *Beacon Life and Fire Assurance Co. v. Gibb*. (1) That being so, the plaintiff can recover the premiums paid since the date of the breach as money paid under a mistake of fact or without consideration, the defendants having been under no risk since that date. The plaintiff either did not know, or having once known had forgotten, the fact that the policies contained a condition against travelling in certain countries, and in either case he can recover the premiums paid since 1897: *Kelly v. Solari*. (2) If, however, the word "void" in condition 6 means voidable at the election of the defendants, the latter by their letters of February 14 and 21, 1911, finally elected to avoid the policies, and that avoidance dates from the breach of the condition, and the plaintiff can recover the premiums paid since that date. In other words, the defendants cannot avoid the policies without placing the plaintiff in the position in which he was at the date when the avoidance took effect. In marine insurance, where the policy is avoided by an innocent misrepresentation, the assured is entitled to a return of the premium: *Feise v. Parkinson* (3); *Anderson v. Thornton* (4). See also *Fowler v. Scottish Equitable Life Insurance Society*. (5) The plaintiff,

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(1) (1862) 1 Moo. P. C. (N.S.) 73,
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(2) (1841) 9 M. & W. 54.

(3) (1812) 4 Taunt. 640.

(4) (1853) 8 Ex. 425.

(5) (1858) 28 L. J. (Cb.) 225.

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therefore, is entitled to recover the amount of the premiums paid. If, however, the plaintiff is wrong in this, he is entitled to a declaration that the policies are valid and worldwide. The defendants' letters are ambiguous, and it is quite uncertain from them what position they take up and whether they treat the policies as void or not.

J. R. Atkin, K.C., and H. G. Robertson, for the defendants. The policies, upon their true construction, became voidable at the election of the defendants upon the plaintiff committing a breach of condition 6 by travelling outside the specified limits. The contract is only voidable at the option of the party who has not done the wrongful act, and upon that party exercising his option to avoid the contract, it becomes void as from the date of the breach. It cannot have been intended to give the wrong-doer the option of making the policies void against the wish of the defendants by committing a breach of condition 6. That would be to allow the wrong-doer to take advantage of his own wrong. The condition was inserted for the benefit of the defendants. It is admitted that, apart from the stipulation in condition 6 declaring that upon the policies becoming void by reason of a breach of that condition the premiums paid shall be forfeited, the defendants could only elect to avoid the policies upon repaying the premiums received by them since the date of the breach, inasmuch as the risk had never attached since that date. It was for the purpose of preventing the assured from recovering back the premiums paid that the stipulation in condition 6 was inserted. The defendants have never elected to treat the policies as void. They have from the time when they first knew of the breach offered to treat the policies as subsisting policies upon certain terms. The plaintiff was insisting that the policies were void and his claim to recover the premiums is based upon that ground. Whether, however, the policies became ipso facto void upon the breach of condition 6, or whether they were only voidable and the defendants elected to avoid them, the premiums paid are not recoverable. The words in condition 6, "the premiums paid shall be forfeited," mean that the premiums paid since the breach which is the cause of the forfeiture shall be forfeited. They cannot mean the premiums paid before the breach, because

those premiums were earned by the defendants, the policies then being valid policies, and there can be no question of forfeiture as regards them. In *Duckett v. Williams* (1) there was a clause in a declaration made before effecting a policy of life insurance that "if any untrue averment be contained herein, or if the facts required to be set forth in the above proposal be not truly stated, all monies which shall have been paid upon account of the assurance made in consequence hereof shall be forfeited, and the assurance itself be absolutely null and void"; and it was held that an untrue statement in the declaration, though made innocently, avoided the policy, and all the premiums paid thereunder became forfeited. That decision was approved by Lord Blackburn in *Thomson v. Weems*. (2) Those authorities are equally applicable to a case where the premiums paid become forfeited through a breach of the condition as to travelling abroad. The plaintiff, therefore, is not entitled to repayment of the premiums.

With regard to the declaration claimed by the amendment in the statement of claim, the plaintiff is not entitled to it, inasmuch as the defendants did not before the issue of the writ dispute the validity of the policies and do not dispute it now.

Gore-Browne, K.C., in reply. The words in condition 6, "the premiums paid," mean the premiums paid before the act causing the forfeiture. No premiums in the strict sense of the term became payable since 1897, when the policies became forfeited. A yearly sum was paid under a mistake of fact. The stipulation as to forfeiture of the premiums was intended to meet the case where the premiums paid were not wholly exhausted, as, for instance, where the act causing the forfeiture happened after the premiums for the year had been paid and before the risk covered by those premiums had fully run out. Under the condition the proportion of the premiums paid to cover the risk for the rest of the year subsequent to the act of forfeiture became forfeited. The clause in the body of the policy, that if the assured shall commit suicide within thirteen months from the date of the policy the policy shall be void and all moneys paid on account of the assurance shall be forfeited, can only apply to

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(1) (1834) 2 Cr. & M. 348.

(2) (1884) 9 App. Cas. 671, at p. 682.

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premiums paid before the date of the forfeiture, and therefore the similar words in condition 6 ought to be read in the same sense. The rest of that clause forfeiting the moneys paid if there is an untrue statement in the proposal or declaration can only apply to premiums paid after such untrue statement has been made, and therefore the cases of *Duckett v. Williams* (1) and *Thomson v. Weems* (2) have no bearing upon the present point. If the defendants had intended the clause to include premiums paid subsequently they should have inserted clear words to that effect. The words "premiums paid" in their natural meaning apply only to premiums paid before the act giving rise to the forfeiture. (3)

BRAY J. In this case a number of points have been raised, but it is only necessary to decide one, namely, the point which is set up in answer to the claim for the recovery back of the premiums paid, and which arises upon condition 6 indorsed upon the policies. That condition says that if the assured shall travel beyond certain limits without obtaining the licence of the defendants the assurance shall be void, "and the premiums paid shall be forfeited." It is contended on behalf of the defendants that those words cover all the premiums paid since the breach by the assured of the condition. That is a question of construction. The words "the premiums paid shall be forfeited" are very familiar words in policies of life insurance. They occur in almost every policy and have done so now for a great number of years. Lord Blackburn in *Thomson v. Weems* (4), speaking of those words, says: "But the insurers have a right if they please to take a warranty against such disease, whether latent or not, and it has very long been the course of business to insert a warranty to that effect. If there was no more than a warranty to that effect, if it was disproved, the risk would never have attached, the premiums therefore would never have become due, and might,

(1) 2 Cr. & M. 348.

(2) 9 App. Cas. 671.

(3) The Statute of Limitations was also pleaded as a defence to the claim for the return of the premiums paid more than six years before the com-

mencement of the action, but it became unnecessary to fully argue it, and no judgment was given upon it. The arguments upon that point are therefore omitted.

(4) 9 App. Cas. at p. 682.

if paid, be recovered back as money paid without consideration. But it became usual, I do not know when, but at least for the last fifty years, to insert a term in the contract that if the statements were untrue the premiums should be forfeited. That, no doubt, is a hard bargain for the assured if he has innocently warranted what was not accurate, but if he has warranted it, 'untruth,' without any moral guilt, avoids the insurance; and in *Duckett v. Williams* (1), in 1834, it was held, on reasoning to my mind irresistible, that, in a declaration substantially as far as regards this point the same as this, what was untrue so as to have the effect of avoiding the insurance was also untrue so as to cause the forfeiture of the premium." The policy in the present case is in the usual form, and it contains the usual clause in the body thereof as to what is to happen in the case of there being an untrue statement in the proposal or declaration. The clause says: "Provided always that if the assured shall commit suicide within thirteen months from the date of this policy, or if in the said proposal or the declaration appended thereto any information has been withheld, or any of the matters set forth have not been truly and fairly stated, then and in either of such cases this policy shall be void, and all moneys paid on account of this assurance shall be forfeited." It is quite clear that according to the law laid down in *Duckett v. Williams* (1), and approved by Lord Blackburn in *Thomson v. Weems* (2), the words "all moneys paid on account of this assurance" include all moneys paid at a time when both parties bona fide thought that the policy was an existing and valid policy.

The corresponding words of condition 6 are nearly but not quite the same. That condition provides: "But if the assured shall go beyond those limits (except in making a direct voyage from one place to another as above stated) or shall engage in a seafaring occupation without obtaining licence from the company, the assurance shall be void, and the premiums paid shall be forfeited." The question turns upon the meaning of "the premiums paid." It must have been in the contemplation of the parties that the question of the avoidance of the insurance might probably not arise until a considerable time after the assured

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(1) 2 Cr. & M. 348.

(2) 9 App. Cas. at p. 682.

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had gone abroad outside the authorized limits, inasmuch as the insurers would probably know nothing of it unless the assured told them, and in the interval the premiums would have been paid. The words in their natural meaning would include the premiums so paid. It is said that they refer to the premiums paid before the act which caused the forfeiture, namely, the assured going abroad. I do not think that I have any right to insert those words. The words "the premiums paid" mean all the premiums paid, and I have no right to limit the meaning by holding that they only refer to the premiums paid before the act causing the forfeiture, more especially as in the body of the policy there is a similar clause in which the words "all moneys paid on account of this insurance" must mean all the premiums paid. I therefore reluctantly come to the conclusion that no action can be brought to recover back the premiums as money paid under a mistake of fact or without consideration, even upon the assumption, as to which I express no opinion, that the policy became ipso facto void as soon as the assured went abroad outside the specified limits without the licence of the defendants.

There remains the claim, inserted shortly before the trial, for a declaration that the policies are valid and effective and world-wide. I assume that if there had been a dispute between the parties, the one asserting and the other denying the validity of the policies, it would have been open to the plaintiff to claim such a declaration. But in my opinion the plaintiff is not entitled to claim a declaration unless before action brought there has been a dispute upon the point as to which he desires the declaration. I can remember a case before Stirling J., in which I was counsel, where that learned judge refused to make a declaration that a policy of marine insurance was not a valid and existing policy, the defendant never having asserted the validity of the policy. I have therefore to see what took place shortly before this action was brought in order to ascertain whether there is any ground for the plaintiff's claim for a declaration. In the letters of February 14 and 21 the defendants no doubt said that the policies were strictly speaking void, and I need not discuss the question whether at that moment a claim for a declaration might or might not have been made.

Upon February 22 the plaintiff's solicitors wrote to the defendants in answer to those letters that "on the footing that the policies are, as you therein state, void as from 1897" the plaintiff claimed repayment of the premiums paid since that date with interest. Upon March 1 the defendants replied that the plaintiff's neglect to give notice of his trip to India made the policies liable to be declared void, but taking all the circumstances into account the defendants waived any claim for foreign extra premium. That to my mind was an offer by the defendants to treat the policies as valid and existing policies without payment of any extra foreign premium for the plaintiff having gone to India in 1897. To that the plaintiff's solicitors replied declining the offer; in other words, they insisted upon the repayment of the premiums. In these circumstances it is not open to the plaintiff, at any rate at this late date, nothing having happened in the interval, to claim the declaration. Therefore that part of the claim also fails. There must therefore be judgment for the defendants. (1)

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Judgment for defendants.

Solicitors for plaintiff: *J. A. & H. E. Farnfield.*

Solicitors for defendants: *Charles Mylne Barker & Co.*

(1) The defendants agreed that there should be inserted in the judgment a statement that, upon the plaintiff paying the premiums due in

June, 1911, they would indorse the policies "admitted worldwide and effective."

W. F. B.

C. A.

[IN THE COURT OF APPEAL.]

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Practice—Order for Judgment under Order XIV.—Judgment signed more than Twelve Months from Date of Order—Notice of Intention to proceed not necessary—Order LXIV., r. 13.

Where, an order having been obtained for judgment under Order XIV., judgment is not signed until more than twelve months afterwards, the case does not come within Order LXIV., r. 13, and therefore it is not necessary that the notice of intention to proceed required by that rule should have been given before signing judgment.

Staffordshire Joint Stock Bank v. Weaver [1884] W. N., p. 78, overruled.

APPEAL from an order made by Scrutton J. at chambers, as after mentioned.

An order giving the plaintiff leave to sign judgment against the defendants in an action was obtained under Order XIV. upon May 28, 1904. No further step was taken by the plaintiff until July 3, 1905, when the plaintiff signed judgment against the defendants under the order of May 28, 1904. The defendants applied to Master Bonner at chambers to set aside the judgment so signed for irregularity on the ground that a month's notice of the plaintiff's intention to proceed had not been given before signing judgment as required by Order LXIV., r. 13. The Master refused the application, but on appeal Scrutton J., on the authority of *Staffordshire Joint Stock Bank v. Weaver* (1) and *Webster v. Myer* (2), reversed his decision, and ordered the judgment to be set aside.

H. S. Simmons (*J. S. Griffith Jones* with him), for the plaintiff. The cases decided before the Judicature Act under the old rules on the subject, the terms of which were substantially similar to those of Order LXIV., r. 13, all tend to shew that the rule does not apply to a case like this, where judgment has really been obtained on the making of the order for judgment under Order XIV., and all that remains to be done is merely to record

(1) [1884] W. N., p. 78.

(2) (1884) 14 Q. B. D. 231.

that judgment: see *May v. Wooding* (1); *Theobald v. Crickmore* (2); *Lumley v. Hempson* (3); *Thompson v. Langridge*. (4) *Webster v. Myer* (5) is distinguishable, because there the judgment was signed for default of appearance, and in that case, as was pointed out by Brett M.R. in giving judgment, a proceeding has to be taken before judgment can be signed, namely, the plaintiff has to prove to the satisfaction of the Court, acting through its officer, that the writ of summons has been duly served on the defendant, and has for that purpose to file an affidavit of service. A "proceeding" for the purposes of Order LXIV., r. 13, means some step in the course of proceedings taken to obtain a judgment from the Court. When the Court has pronounced its judgment, those proceedings are at an end. The mere signing of judgment is a formality, which the party is entitled to carry out at any moment as a matter of course. The notice mentioned in Order LXIV., r. 13, is required for the purpose of enabling the opposite party to prepare for resistance to the further proceeding, if he is so minded: see the judgment of Lord Ellenborough in *May v. Wooding*. (1) In a case where the litigation has been terminated by a judgment pronounced by the Court, there is no possibility of resistance to the mere recording of that judgment. [He also cited *Hamp-Adams v. Hall*. (6)].

Hohler, K.C. (*Tindale Davis* with him), for the defendants. The decisions with regard to proceedings after verdict before the Judicature Act turned upon rules no longer in existence, and Brett M.R., in giving judgment in *Webster v. Myer* (7), appears to suggest that they are not now binding, or at any rate are only binding in the case of proceedings after verdict, and that, with reference to other cases, Order LXIV., r. 13, ought to be construed upon the natural construction of its terms without reference to those decisions. Field J., who was a judge of great authority on matters of practice, so construed the rule in *Staffordshire Joint Stock Bank v. Weaver*. (8) The decision in *Lumley v. Hempson* (3) has no application whatever to the present case.

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(1) (1815) 3 M. & S. 500

(5) 14 Q. B. D. 231.

(2) (1819) 2 B. & Ald. 594.

(6) [1911] 2 K. B. 942.

(3) (1838) 6 Dowl. 558.

(7) 14 Q. B. D. 231, at p. 233.

(4) (1847) 1 Ex. 351.

(8) [1884] W. N., p. 78.

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The proceeding there was an application for the purpose of setting aside the proceedings in the matter *ab initio*, as being invalid. Such a proceeding cannot be called a proceeding in the cause or matter itself. It is submitted that, on the plain and natural meaning of the terms of Order LXIV., r. 13, the signing of judgment is a proceeding in a cause or matter. *Webster v. Myer* (1) is substantially undistinguishable from the present case. The mere filing of an affidavit verifying the service of the writ cannot be called a proceeding for the purposes of Order LXIV., r. 13. It has been suggested for the plaintiff that the object of the notice mentioned in the rule is to enable the opposite party to prepare for resistance. A defendant who has not appeared, and therefore is not before the Court, cannot resist the entry of judgment for default of appearance, and therefore, according to the plaintiff's contention, *Webster v. Myer* (1) ought to have been decided the other way. A defendant might well have ground for resisting the signing of judgment by the plaintiff, at any rate for the full amount mentioned in the order for judgment. There might be payments on account of that amount in the interval subsequent to the making of the order for judgment.

H. S. Simmons, for the plaintiff, in reply. Any such matter as a payment by the defendant on account of the amount for which leave to sign judgment had been given would not be ground for resisting the signing of judgment, but for limiting the amount for which the plaintiff would be entitled to issue execution upon the judgment when signed.

VAUGHAN WILLIAMS L.J. This is an appeal from the order of Scrutton J. reversing an order made by Master Bonner. The application made to the Master was to set aside a judgment signed on July 3, 1905, on the ground that it was improperly signed. The order under which it was signed was made under Order XIV. more than twelve months previously to the signing of the judgment, and, that being so, the irregularity alleged was that the judgment had been signed without a month's notice of intention to proceed having been given pursuant to Order LXIV.,

(1) 14 Q. B. D. 231.

r. 13. The whole question which we have to decide is really whether the signing of the judgment in this case was a "proceeding" within the meaning of that rule.

A good many cases have been cited to us, which were decided before the passing of the Judicature Act, but those cases are still applicable to the question before us, because, as appears from Chitty's Archbold's Practice, 14th ed., p. 1437, the terms of Order LXIV., r. 13, are practically the same as those of r. 176 of the Rules of Hilary Term, 1853, and the previous rules upon which those cases were decided. I do not think that it is necessary for me to go all through the earlier decisions, because the whole of those decisions appear to have been based upon the same reasoning. There are really only two decisions which can be said to be inconsistent at all with the series of decisions given under the old rules. I cannot state the principle upon which that series of decisions appears to depend better than in the words of Lord Ellenborough in *May v. Wooding*.⁽¹⁾ He there says: "The reason of the rule is this, that while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he may prepare himself, but, when the matter has passed in rem judicatam by the verdict, the same reason does not apply. The rule of this Court, therefore, relates merely to interlocutory stages of the cause. No instance is stated where it has been carried farther, and there is no analogy to aid this case." All of the series of cases to which I have referred went on the principle that the rule only applied to proceedings towards judgment, and did not apply to proceedings after judgment obtained.

One of the cases to which I have alluded as not being in accord with the earlier cases is *Staffordshire Joint Stock Bank v. Weaver* (2), decided by Field J. in chambers. There the order for judgment under Order xiv. was not acted on for more than a year, and therefore the case is precisely similar to the present case. It was held there that the plaintiff was not entitled to sign judgment without having given a month's notice in pursuance of Order LXIV., r. 13. The case is therefore a direct authority in favour of the view contended for by the defendants'

(1) 3 M. & S. 500.

(2) [1884] W. N., p. 78.

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counsel in the present case. It is to be observed, however, that no cases appear to have been cited to the learned judge, and no counsel are mentioned as having appeared before him. Field J. is reported as having said: "There is no authority in support of this application, except the semblance in the book of practice that has been referred to" (1 Chitty's Archbold's Practice, 13th ed., p. 180). "But I must look at the language of the rule. This is a cause in which there has been no proceeding for a year from the last proceeding. Is the plaintiff, who is applying here, a party who desires to proceed? He clearly desires to proceed by signing judgment against the defendant. Then he shall give a month's notice to the other party of his intention to proceed." The learned judge was, as I know of my own personal knowledge, regarded as a very great authority on matters of practice, of which in his early career as a solicitor he had a larger experience than falls to the lot of most judges. But, in spite of that, I cannot think that the view which he took was correct, or believe that he would have made the order which he made, if he had had the series of decisions to which I have referred brought to his notice. Under these circumstances I do not think that we ought to follow his decision in that case. With regard to the passage in Chitty's Archbold's Practice, 13th ed., p. 180, referred to by Field J., there is in that passage undoubtedly this statement: "This rule only requires a notice to be given before taking a proceeding towards judgment, and does not therefore apply to a motion to set aside proceedings; nor does it apply to proceedings after verdict, or after final judgment; but it does to proceedings after interlocutory judgment, as notices of inquiry, &c. Nor does the rule apply to a case of signing judgment on a cognovit, whether given before or after appearance: nor, it would seem, to a case of signing judgment on a judge's order allowing the signing of it." That statement is not conclusive one way or the other: it is merely an expression of a kind which leaves the matter in doubt, and I do not think it necessary to say any more about it.

Having got thus far, I have now to apply the rule laid down by Lord Ellenborough in *May v. Wooding* (1), and followed in the long series of judgments to which I have referred, and which

all proceed on the same basis, and to say whether the signing of the judgment in this case in 1905 upon an order made more than twelve months before in 1904 is such a proceeding as comes within the operation of Order LXIV., r. 13. I am of opinion that it is not. I think that there was no need in this case to give the notice prescribed by the rule on the ground that this particular step, or proceeding, or whatever it may be called, was really a step or proceeding taken after judgment, and after an end of the litigation had been arrived at, and not an interlocutory proceeding, and therefore Order LXIV., r. 13, ought not to be read as applying to this case. For these reasons I think that the appeal should be allowed.

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BUCKLEY L.J. On May 28, 1904, the plaintiff obtained leave to sign judgment against the defendants in an action under Order xiv. Nothing more was done in the action until July, 1905, that is to say, until after the lapse of more than twelve months. On July 3, 1905, the plaintiff signed judgment. The question is whether the signing of that judgment was a proceeding within the meaning of Order LXIV., r. 13. That rule is a rule the terms of which are in all material respects identical with those of the former rules on the subject in force from time to time prior to the Judicature Act. On those rules there are four decisions, which are all more or less in favour of the contention of the plaintiff that notice was not requisite in this case. They have not all the same bearing on the present case, but they all look in the same direction. The first is the case of *May v. Wooding*. (1) There the plaintiff, who had obtained a verdict in Easter Term, 1811, did nothing thereon till 1815. A rule was then obtained for judgment, and judgment was signed. The question was whether notice ought to have been given under the rule then in force. Lord Ellenborough held that notice was not necessary on the ground that the matter had passed in *rem judicatam*, and nothing remained in controversy. The next case is *Theobald v. Crickmore* (2), which was similar to *May v. Wooding*. (1) The next is *Lumley v. Hempson* (3), which has less bearing on the

(1) 3 M. & S. 500.

(2) 2 B. & Ald. 594.

(3) 6 Dowl. 558.

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present point. The application there was to set aside proceedings in an action as having been irregular from the first. This could not properly be called a further step in the proceedings; it was an application made on the basis that there were no regular proceedings. The last of the four cases is *Thompson v. Langridge* (1), which is, in substance, similar to *May v. Wooding*. (2) All these cases go to shew that under r. 13 of Order LXIV., which reproduces the terms of the rules upon which they were decided, notice was not necessary in a case like the present. Two modern decisions on the subject are *Staffordshire Joint Stock Bank v. Weaver* (3), decided by Field J., which is directly against the contention of the plaintiff in this case, and *Webster v. Myer*. (4) It appears to me that the latter case, so far as it has any bearing on the present question, is distinguishable. There an application was made by the plaintiff to enter judgment for default of appearance more than twelve months after service of the writ. In that case something had to be proved. Service of the writ was a step, and an affidavit of service had to be filed, before the judgment could be signed; it was a case, not of merely recording something which had taken place before, but of taking a fresh step in respect of which evidence was necessary before the plaintiff was entitled to sign judgment. In the present case the signing of judgment was but the recording of a past act. In *Holtby v. Hodgson* (5) a verdict had been obtained by the plaintiff in an action, and the judge at the trial had directed judgment to be entered accordingly, but, before judgment was signed, garnishee proceedings were taken by a judgment creditor of the plaintiff to attach the amount recovered. It was held that the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of the judgment creditor to a garnishee order, for the actual signing of judgment was but the completion of something which had been done before. Having regard to these considerations, the case of

(1) 1 Ex. 351.

(2) 3 M. & S. 500.

(3) [1884] W. N., p. 78.

(4) 14 Q. B. D. 231.

(5) (1889) 24 Q. B. D. 103.

Webster v. Myer (1) is not in point. The decision of Field J. in *Staffordshire Joint Stock Bank v. Weaver* (2) is, as I have said, directly against the plaintiff. That case was decided at chambers, and no cases appear to have been cited to the learned judge. It was, no doubt, a decision by a judge of great authority on such a matter; but, looking at the authorities, which do not appear to have been cited to him, I come to the conclusion that his decision was wrong. In my opinion the signing of judgment on July 3, 1905, was not a proceeding for the purposes of Order LXIV., r. 13, and, consequently, that rule does not apply. I therefore think that the order of Scrutton J. should be set aside and the order of the Master restored.

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KENNEDY L.J. I am of the same opinion, and the matter has been put so clearly that I have very little to add. It appears on reference to the argument in *May v. Wooding* (3) that, for a long period dating back to the time of Queen Anne, there has been some kind of rule, substantially similar to Order LXIV., r. 13, which has required that, where no proceeding had been taken in an action for more than a year, a month's notice of intention to proceed should be given before taking any fresh proceeding in the action. Taking the case of *May v. Wooding* (3) as a starting point, it was decided nearly a century ago by Lord Ellenborough that the intention of the rule then in force was that the opposite party should, as long as the matter was still in controversy, have a month's notice of intention to proceed where four terms had elapsed since the last proceeding. Having regard to what was stated in that case, I think that, where the word "proceed" is used in the existing rule, it refers to some proceeding while the matter is still in controversy, or there is still some further step to be taken before judgment is obtained; as in the case of an application to enter judgment for default of appearance, where, as pointed out by Buckley L.J., a further preliminary proceeding is necessary on the part of the person seeking to sign judgment, and therefore the proceeding is one towards judgment, and not one merely for the purpose of

(1) 14 Q. B. D. 231.

(2) [1884] W. N., p. 78.

(3) 3 M. & S. 500.

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realizing a judgment, already pronounced, by entering formal judgment, which may be entered merely on production of the order which determined the controversy. As to the case of *Staffordshire Joint Stock Bank v. Weaver* (1), which was relied upon by the defendants' counsel, that was a decision at chambers by a judge who, no doubt, was a great authority in matters of practice, but it is to be observed that the application appears to have been made *ex parte* at the request of a district registrar, who desired to have a direction on the point of practice involved, and no counsel are mentioned as having been engaged in the case. The learned judge was referred to the *semble* contained in Chitty's Archbold's Practice, 13th ed., at p. 180, which, however, he declined to follow, but he does not appear to have had the assistance of any argument or to have had the decisions on the subject brought before him. With great respect to him I cannot think upon the authorities that we are wrong in differing from the opinion expressed by him in that case. Upon the grounds which I have mentioned I think that the notice provided for by Order LXIV., r. 13, was not in the present case necessary, and the appeal should therefore be allowed.

Appeal allowed.

Solicitors for plaintiff: *Godfrey & Robertson.*

Solicitors for defendants: *Haseldine & Green.*

(1) [1884] W. N., p. 78.

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 2.

*Practice—Appearance—Appearance under Protest—Conditional Appearance—
Enlargement of Time for objecting to Jurisdiction.*

A defendant who objects to the jurisdiction has an absolute right to appear under protest. The practice of the Master in dealing with an appearance under protest of allowing the defendant a reasonable time for applying to set aside the writ and then sealing the appearance with an entry that the appearance is to stand as unconditional unless the defendant makes the application within the prescribed time has no statutory authority and cannot limit the power of the Court to enlarge the time for objecting to the jurisdiction. The meaning of the practice, which is necessary to prevent the hands of the Court from being tied up indefinitely by a formal protest, is merely that the omission of the defendant to apply to set aside the writ within the prescribed time raises a presumption against him of waiver of the objection to the jurisdiction and entitles the officials of the Court in the ordinary course to treat the appearance as absolute.

APPEAL and cross-appeal from an order of Lush J. in chambers.

On March 31, 1911, the plaintiff, a merchant of London, issued a writ in an action in the King's Bench Division against the defendant, a merchant of Madras, for payment of 425*l.* The action arose out of a series of commercial dealings between the parties and was founded on breach of contract. The plaintiff having obtained leave to serve the writ out of the jurisdiction, the writ was served on the defendant on April 20 and the last day for appearing was July 19.

In June, 1911, Messrs. Elwes & Miller, a firm of London solicitors, received instructions from Mr. Josselyn, the defendant's solicitor in Ipswich, to enter an appearance for the defendant under protest as he intended to question the jurisdiction of the Court. Mr. Elwes, who had the charge of the matter, was informed in answer to inquiries made at the appearance department of the Central Office that an appearance could not be entered under protest without the fiat of a Master. Accordingly on July 14 he attended the Master and handed him a form of

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appearance which was stated to be "under protest" and "without prejudice to an application to set aside the writ or service thereof on the ground that this Court hath no jurisdiction over the defendant," and he intimated that eight weeks would be sufficient time to enable the defendant to make the application. The Master wrote "eight weeks" with his initials and the date on the appearance, which was then taken to the appearance department and stamped with the following entry :—"This appearance is to stand as unconditional unless the defendant applies within eight weeks to set aside the writ or service thereof and obtains an order to that effect." On July 31 a draft affidavit in support of the intended application to set aside the writ was sent out to India with an intimation that on the return of the affidavit the application would be made and that the application should be made within eight weeks. Elwes left for his holidays on September 2, at which date the affidavit had not been returned, and he forgot to leave any instructions on the subject. On his return on October 2 he learned for the first time that the affidavit had been received from India on September 11, and he at once wrote to the plaintiff's solicitors for an extension of time, which was refused. On October 5 he took out a summons on behalf of the defendant against the plaintiff asking that the writ or service thereof might be set aside on the ground that the Court had no jurisdiction over the defendant and that the time allowed by the Master for making the application might be extended accordingly. Lush J. made the following order :—"The judge being of opinion that he has no power now to enlarge the time and that the appearance having become absolute the application must fail, but that if he had jurisdiction to enlarge the time he would have extended it, and the judge being of opinion also on the merits that the application should fail, and subject to the condition that in the event of the Court at the trial holding that there was no breach within the jurisdiction the action should be dismissed. Dismiss the application with costs to be the plaintiff's in any event." The plaintiff appealed from this order in so far as it imposed a condition and asked that the appearance ought to be held to be absolute without any condition being attached to it. The defendant lodged a cross-appeal asking that the order might

be reversed and that the writ might be set aside and, if necessary, that the time allowed by the Master for making the application might be extended.

The plaintiff's appeal was not contested by the defendant at the hearing.

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Archibald Read, for the defendant upon the cross-appeal. There appears to be an unwritten rule that a defendant cannot enter an appearance under protest except by leave of the Master. The Master allowed a conditional appearance which contains an entry that the appearance is to stand as unconditional unless the defendant applies to set aside the writ within eight weeks. That time proved to be insufficient and the appearance then became unconditional. It is submitted that the defendant had an absolute right to enter an appearance under protest and that this was not a conditional appearance.

[FARWELL L.J. The rules do not provide either for an appearance under protest or for a conditional appearance. What do you say is the difference?]

It is difficult to say; but even if this is a conditional appearance which has become unconditional, that merely raises a presumption that the defendant has waived his right to object to the jurisdiction, and that presumption may be rebutted by shewing that he has given notice of his intention to object and has never withdrawn that notice.

[FARWELL L.J. I am satisfied that the defendant had a right to appear under protest. The question is whether there has been any waiver of his right to object to the jurisdiction and whether we can enlarge the time.]

The fact that the appearance has become unconditional is not conclusive as to the waiver of the defendant's right to object to the jurisdiction: *Crozier, Stephens & Co. v. Auerbach* (1); *The Jassy* (2); nor can the practice of the Master control the power of the Court to enlarge the time for raising the objection.

J. D. Crawford, for the plaintiff. The practice as to entering an appearance under protest is correctly laid down in the Yearly

(1) [1908] 2 K. B. 161.

(2) [1906] P. 270.

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Practice, 1912, vol. 1, at pp. 99, 100, and also in the Annual Practice, 1912, vol. 1, at p. 121. The practice is for the Master to allow the defendant a reasonable time for applying to set aside the writ and to seal the appearance with an entry that unless the application is made within that time the appearance is to stand as unconditional. No doubt the Practice Masters' Rules by which this practice is prescribed—see Annual Practice, 1912, vol. 2, p. 1038—have not the authority of the Rules of the Supreme Court: *Hume v. Somerton* (1); *In re Ermen* (2); but there are many points of practice which have been established for years, but which are not dealt with in the latter Rules. Service out of the jurisdiction can only be obtained by leave, and unless some condition is entered on the appearance the leave is useless. There must be some machinery for limiting the conditional character of the appearance. Assuming that the Master had authority to order an appearance to be entered in this form, then, the defendant not having applied within the prescribed time to set aside the writ, the appearance stands as unconditional and becomes absolute, and the Court has now no jurisdiction to extend the time. *Whistler v. Hancock* (3) applies.

[FARWELL L.J. The distinction is that in that case there was no action left.]

This case does not fall within the rule empowering the Court to grant an extension of time, Order LXIV., r. 7, because that rule applies only to times appointed by the Rules. [He also referred to *Bonnell v. Preston*. (4)]

FLETCHER MOULTON L.J. In this case a preliminary point was taken before Lush J. in chambers and decided against the appellant, and it is on that point alone that we propose now to give judgment. The action was brought by an English merchant against a merchant in Madras, and leave was granted to serve the writ out of the jurisdiction. The writ was served in Madras with a notice requiring the defendant to enter an appearance within ninety days after service. The defendant contended and still contends that this was a case in which the English Courts

(1) (1890) 25 Q. B. D. 239.

(2) [1903] 2 Ch. 156.

(3) (1878) 3 Q. B. D. 83.

(4) (1908) 24 Times L. R. 756.

had no jurisdiction and instructed his solicitors to enter an appearance under protest. He had a perfect right to do so. Two courses are open to a defendant who objects to the jurisdiction. He may disregard the writ and refuse to enter an appearance at all; or he may out of respect for the Court enter an appearance under protest, reserving his right to object to the jurisdiction. He has a right to choose one or other of these courses. Perhaps it is not absolutely necessary that the appearance should be formally stated to be under protest if the Court could subsequently be convinced that there was never any intention to waive the objection to the jurisdiction, but of course it is a difficult thing to convince the Court that there was no intention to submit to its jurisdiction unless these words "under protest" are inserted in the appearance as entered. These words therefore are an almost necessary precaution in order that the nature of the appearance may not be misunderstood. It seems that a practice has arisen for which I can see no authority in the Rules. No appearance under protest is entered till the matter has been referred to the practice Master, whose custom is to indorse upon the appearance a note that the appearance stands as unconditional unless the defendant applies within a certain number of days (fixed by the Master) to set aside the writ or service thereof and obtains an order to that effect.

Here the Master fixed eight weeks as the period within which the application was to be made. Now it happens here that through one of the ordinary mistakes which occur in life no application to set aside the service was made within the period fixed by the Master. The respondent contends that in that case the appearance became unconditional, that it was absolute for all purposes, and that it is beyond the power of this Court to set it aside. In my opinion that contention is wholly untenable. A defendant has a perfect right to enter an appearance under protest and no Master can refuse to allow him to do so. But at the same time one must remember that a vast proportion of actions never go through the later stages. They never emerge from the stage of chambers. It is obvious, however, that no Court will permit a formal protest to its jurisdiction to create a

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delay in its process, which delay is to be so entirely in the hands of the defendant that the defendant can tie the hands of the Court indefinitely by not taking any further steps. Now suppose a case in which an appearance is entered under protest. It is evident that such an appearance must be taken as an actual appearance unless the defendant with reasonable promptitude obtains an order setting aside the writs or it would be the means of imposing upon a plaintiff who has a good cause of action a great and unjustifiable delay in recovering his rights. Hence the practice has arisen that the Master indorses on the appearance a period of time during which the application to set aside the writ ought to be made. In my opinion that means that if the application is not made within that time it will be taken *prima facie* to be an abandonment of the conditional and limited character of the appearance so that the officials of the Court will be justified in treating it as an absolute appearance. Suppose the time is eight months and that this period has expired and a statement of claim has been delivered and the time has arrived at which in default of defence the plaintiff would have been entitled to sign judgment. Then in the ordinary course the officials of the Court will treat the appearance as if it was an unconditional appearance and the plaintiff will be entitled to sign judgment. Unless some limitation of that kind is put a mere conditional appearance would tie up their hands for ever. But that practice cannot limit the power of the Court to set aside the writ or the service, nor does it really limit the effect of the defendant's having entered an appearance under protest. Therefore if he has entered an appearance under protest, whether the time fixed by the Master for applying to set aside the writ has expired or not, and if he makes an application to the Court to set aside the writ and the Court is of opinion that the delay in making that application does not shew an intention to abandon the protest, or an improper attempt to impede the administration of justice, it has the fullest power to give effect to that protest and to set aside the writ or the service. I am not now deciding this case on the merits. I am deciding that so far as the judge held that he was precluded from considering the merits of the application he was

wrong. In my opinion he had power to set aside the service of the writ.

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FARWELL L.J. I am of the same opinion. The Rules do not provide in terms for entering an appearance under protest. But it is obvious that the protest is the protest of the defendant and that the condition as to the time for hearing and deciding on the protest is the term imposed by the Master—and I think rightly imposed. In these cases it is plain that some time is required to be limited within which the protest should be disposed of, and I see no objection to the statement of the practice in the Yearly Practice, 1912, vol. 1, pp. 99, 100, if read with the addition of the words “unless the Court or a judge shall otherwise order.” The Master has no power to impose this condition under the ordinary rules, but he purports to act under the authority of the Practice Masters’ Rules, which have no statutory authority but are mere rules of convenience. It is said on behalf of the respondent that because the Master is acting without statutory authority the Court has no power to enlarge the time. The argument is that the Court cannot enlarge the time because the rule as to enlarging time (Order LXIV., r. 7) applies only to a case where the time is fixed under the rules of the Court. That seems to me to be a fatal argument. It is inconceivable that the Court should allow itself to be hampered in that way. It is said that the time cannot be enlarged by reason of the fact that the Practice Masters’ Rules have no statutory authority. I agree that the practice prescribed by those Rules is convenient, but it is startling to say that the practice is so hidebound that it shall never be open to the Court to say that an appearance which has become unconditional under those Rules shall be treated as conditional or that the Masters can deprive the Court of jurisdiction. In my opinion the judge was not fettered as he thought he was, and upon this point the appeal should be allowed.

THE COURT then heard the cross-appeal upon the merits, and came to the conclusion upon the evidence that the alleged breach of contract was a breach within the jurisdiction, and that the

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defendant's objection was untenable. In the result the plaintiff's appeal was allowed and the cross-appeal dismissed, the costs to be the plaintiff's in any event.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for defendant: *Elwes & Miller, for Josselyn & Sons, Ipswich.*

Solicitors for plaintiff: *Reynolds & Son.*

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Oct. 31.

[IN THE COURT OF APPEAL.]

ACTIESELSKABET DAMPSKIB "HERCULES" v.
GRAND TRUNK PACIFIC RAILWAY COMPANY.

Practice—Foreign Corporation—Service of Writ within the Jurisdiction—Carrying on Business in England—London Committee—Raising of Loan Capital within the Jurisdiction—Order IX., r. 8.

The defendants were a company incorporated by a statute of the Dominion of Canada for the purpose of constructing and working a railway in that country; their office was in Montreal. Four of the directors, resident in this country, formed the London committee, which, under powers conferred by the company's by-laws, dealt with the issue of loan capital to be used for the construction of the railway. The whole of the loan capital, amounting to many millions, was raised by the London committee and remitted by them to Canada. The London committee, which had a secretary and staff, met at an office in the city of London, for which they paid no rent; the minute-books, ledgers, pass-books, &c. of the committee were kept at that office. The money raised by the committee was paid into an account at a London bank, out of which account remittances were made to Canada. No business of the company, other than the financial business of raising the loan capital, was transacted by the London committee. A writ in an action of demurrage having been issued by the plaintiffs against the defendants:—

Held, that the defendants were carrying on their business at the office used by the London committee so as to be resident at a place within the jurisdiction, and that the secretary could, therefore, be properly served there with the writ.

APPEAL of the defendants from an order of Lawrance J. at chambers.

The facts appearing in the affidavits used upon the hearing of the summons and upon the cross-examination of the deponents were substantially as follows.

The plaintiffs were a company registered in accordance with the laws of Norway and carried on business in that country. The defendants were a railway company incorporated by a statute of the Dominion of Canada (3 Edw. 7, c. 122). The action was brought to recover demurrage upon the plaintiffs' ship *Hercules* alleged to have become due under the terms of a charterparty entered into between the plaintiffs and the defendants, the question, so far as it was a question of fact, depending largely upon what happened at Prince Rupert, a port on the Pacific coast of the Dominion of Canada. The ship carried a cargo of steel rails for use in the construction of the defendants' railway. The writ was served originally on one Salter at an office in Cockspur Street, but this service was set aside on its appearing that the office belonged to the Grand Trunk Railway Company of Canada, and that the defendant company did not carry on any business there. The writ was then served on H. H. Norman, the secretary of the London committee of the defendant company, at Dashwood House, New Broad Street, E.C.

The office of the defendant company was in Montreal, where the register of shareholders was kept, and where all meetings of the board of directors were held. The defendant company did not form, and never had formed, part of the Grand Trunk Railway Company of Canada system, but was always kept entirely distinct from it. For the purpose of raising loan capital for the construction of the railway (which is still unfinished) the defendant company had a London committee, deriving its powers from article 5 of the company's by-laws, which in substance ran thus: "The directors resident in England shall constitute the London committee and act as an advisory committee to the board, and shall, under the direction of the board, have especially a general supervision of the finance of the company, and may make such application and investment of the funds of the company and issue of its capital and bonds as are not contrary to law. A chairman, who shall preside at meetings of the

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C. A. 1911 <hr/> ACTIESEL- SKABET DAMPSKIB "HERCULES" v. GRAND TRUNK PACIFIC RAILWAY.	<p>London committee, shall be appointed from its members by the affirmative votes of a majority of all the members of such committee. The London committee may appoint a secretary, who shall keep a full and accurate report of all its proceedings and report the same from time to time to the board. The sum of \$12,500 shall be annually set aside by the directors and placed to the credit of the London committee as remuneration to be paid to the members of the committee and their secretary and staff. The said sum shall be apportioned as the committee may determine." The board of directors of the defendant company consisted of fifteen members, of whom four constituted the London committee; the chairman of the London committee, one Smithers, was also the chairman of the Grand Trunk Railway Company of Canada, and Norman was the secretary of the last-named company and also of the London committee of the defendant company. The offices at Dashwood House were the offices of the Grand Trunk Railway Company of Canada, which was a limited company registered in the United Kingdom under the Companies Acts, and was wholly distinct from the defendant company, but the name of the defendant company (the Grand Trunk Pacific Railway Company) was also written on the door. The meetings of the London committee, which began to act in December, 1904, were held in the board-room at Dashwood House, and the minute-book, cash-books, cheque-books, and pass-books of the defendant company were kept there in a safe belonging to the Grand Trunk Railway Company of Canada. The London committee paid no rent for the use of the offices. The business done by the London committee consisted in raising loan capital for the use of the defendant company in the construction of the line in Canada, and all issues of bond or debenture capital had been made by them in the United Kingdom. Large issues of debenture stock had also been made in this country by the London committee, and circulars inviting subscriptions for the stock had been issued by them from Dashwood House. A London register of this stock was kept there. It did not appear that there had been any issue of ordinary capital, except so far as necessary for the qualifications of the directors. The proceeds of the issues of the bond and</p>
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debenture capital were paid into an account of the defendant company with a London bank, and remittances were made out of that account to the Bank of Montreal. Small matters of finance, such as postage and stationery, were paid out of the defendants' London banking account. The London committee, with the secretary and staff, were paid for their service in accordance with article 5 of the by-laws above set out.

The defendants took out a summons to set aside the service of the writ upon Norman on the ground that the defendant company was not resident and did not carry on business within the jurisdiction, and the Master made an order setting aside the service. Upon appeal to the judge in chambers, Lawrance J. reversed the Master's order. The defendants appealed.

Atkin, K.C., and *D. Stephens*, for the defendants. The order of the Master was right and should be restored. The service was bad, for the defendants are not resident within the jurisdiction, that is, they do not carry on their business at a fixed place within it. In all the cases in which service of a writ within the jurisdiction upon the representative of a foreign corporation has been held good the foreign corporation was carrying on its main business in this country. Here the main business of the defendants is the construction and eventually the working of a railway in Canada, and no part of that railway business is carried on here; no contracts relating to the construction of the railway are entered into by the London committee. The sole work done by the London committee is to manage for the defendants the issue of their loan capital, work which is done at the office of another company for the use of which they pay no rent. This work of raising money is work done preliminary to carrying on the business of a railway at all, and there is no case which goes the length of holding that a foreign corporation which is raising capital here preliminary to carrying on business elsewhere by means of that capital is carrying on business. It is clear from the judgment of Vaughan Williams L.J. in the *Saccharin Corporation Case* (1) that the foreign corporation must have a definite place of business within the jurisdiction, and in that

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(1) [1911] 2 K. B. 516, at p. 522.

C. A. case the foreign corporation was held to carry on business here
 1911 because the business of selling their goods was carried on here
 ACTIESSEL- and orders were executed by their agent here out of stock kept
 SKABET in this country. In *Badcock v. Cumberland Gap Park Co.* (1)
 DAMPSKIB service upon the London agent of a foreign corporation was set
 "HERCULES" aside, although the majority of the shareholders were English
 v. and the agent issued circulars and prospectuses which spoke of
 GRAND the "London office" of the company.
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[BUCKLEY L.J. In that case no contracts, even for borrowing purposes, were made by or on behalf of the foreign corporation in this country.]

The evidence shews that the London committee was merely an advisory body, whose acts were subject to the approval of the board of directors in Montreal. [They also referred to the *Dunlop Case*. (2)]

Adair Roche, for the plaintiffs. The service was good. The question is really one of fact. Upon the facts the sole question for determination is, in the language of Lord Halsbury L.C. in the case of *La Bourgogne* (3), whether the foreign corporation is "here"; if so, it may be served. The doing of the financial business in this country by the London committee makes the defendant corporation "here" within the meaning of that decision. The committee use a definite office within the jurisdiction, and it is immaterial that they do not have the exclusive use of it and of the staff, and that they pay no rent. It is idle to contend that, in issuing through its accredited agents many millions of loan capital, the defendants are not carrying on business and carrying it on here.

D. Stephens, in reply. The case of *La Bourgogne* (3) is distinguishable, for it is plain from the report of that case in the Court below (4) that the foreign corporation was making contracts and earning profits in England. It is not enough that the defendants are raising money here.

[KENNEDY L.J. They are not merely raising money, but are raising it by the machinery of an office in this country officered by their own servants.]

(1) [1893] 1 Ch. 362.

(2) [1902] 1 K. B. 342.

(3) [1899] A. C. 431.

(4) [1899] P. 1.

VAUGHAN WILLIAMS L.J. We are all of opinion that this appeal must be dismissed. The only question we have to consider is whether the financial business of the defendant company—that is, the business of raising loans for use by the company in Canada—is of such a character that we ought to hold that they are carrying on business within the jurisdiction. Undoubtedly the defendants have officers here who act on their behalf at a fixed residence and who circulate advertisements of the defendants in their name; but it is contended that we ought to hold that they are not carrying on the business of the company, because the business carried on here is not that of running or managing the railway, but of raising money by means of the issue of bonds and debentures, which money is to be used by the company in Canada. In my judgment it is impossible to draw any such distinction. I think that in doing what it did the London board was carrying on the business of the company, and that it makes no difference that they pay no rent for the office in which they carry it on. The office is the office of the company; the business is advertised in every way as being carried on at the office. The appeal must therefore be dismissed.

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BUCKLEY L.J. I am of the same opinion. The defendants are "here" (that is, are found within the jurisdiction) for the purpose of the service of a writ, and their appeal fails. In Order ix., r. 8, which relates to service upon corporations, there is no such expression as "reside" or "carry on business." Those are expressions found in judgments which have dealt with this subject. We have only to see whether the corporation is "here"; if it is, it can be served. There are authorities as to the circumstances in which a foreign corporation can and cannot be said to be "here"; the best test is to ascertain whether the business is carried on here and at a defined place. In the present case the company has a paramount, and also a subsidiary, object: its paramount object is to make and run a railway in Canada, to do which a great many things must first happen: it has a subsidiary object, namely, the raising of money to carry out its paramount object. Is this company so carrying

C. A. on here that subsidiary object as that the company is carrying
 1911 on business here? I am of opinion that it is. This company
 ACTIESSEL- makes contracts in this country for the purpose of raising loan
 SKABET capital; it is here by its agents who make such contracts on its
 DAMPSKIE behalf and at a fixed place. The cardinal factors are that the
 "HERCULES" company does acts within the jurisdiction which are part of its
 v. business as a company, and does them at a fixed place within
 GRAND the jurisdiction. The raising of this loan capital is part of the
 TRUNK company's business, and it is done here by a London committee
 PACIFIC constituted of the directors resident in England. They are the
 RAILWAY. company's agents in this country for that purpose. The result
 Buckley L.J. is that the defendant company is resident here and is carrying
 on business here so as to be capable of being served with a writ.
 The appeal must be dismissed.

KENNEDY L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Batten, Proffitt & Scott.*

W. J. B.

[IN THE KING'S BENCH DIVISION AND IN THE
COURT OF APPEAL.]

K. B. D.

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VIRGINIA CAROLINA CHEMICAL COMPANY *v.* NOR-
FOLK AND NORTH AMERICAN STEAM SHIPPING
COMPANY.

Oct. 13, 16,
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Nov. 20, 21,
22.

*Ship—Fire caused by Unseaworthiness—Damage to Goods—Extent of Ship-
owner's Liability—Bill of Lading—Exceptions—Merchant Shipping Act,
1894 (57 & 58 Vict. c. 60), s. 502.*

Sect. 502 of the Merchant Shipping Act, 1894, provides that "the owner of a British sea-going ship" shall not be liable for "any loss or damage happening without his actual fault or privity" where goods on board his ship are lost or damaged by reason of fire on board the ship.

A bill of lading contained a clause providing that the shipowner was not responsible for any loss of or damage to the goods received thereunder for carriage occasioned by (inter alia) fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness.

Held by Bray J. and by the Court of Appeal, that a shipowner is not deprived of the protection of s. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship, but that the effect of a bill of lading containing the above clause is to preclude the shipowner from setting up the section as an answer to a claim for the loss of goods, shipped under the bill of lading, by reason of fire on board the ship caused by the unseaworthiness of the ship.

TRIAL of preliminary points of law arising in an action in the commercial list.

The points of claim were as follows :—

1. By a bill of lading dated Glasgow, August 18, 1910, signed for the master on behalf of the defendants as owners of the steamship *West Point*, the defendants acknowledged that there had been shipped (or received for shipment) in apparent good order and condition by James Miller, Son & Co. on board the steamship 8986 bags of sulphate of ammonia to be delivered to order or assigns in like good order and condition at Charleston. The plaintiffs are bill of lading holders to whom by indorsement the property in the goods has passed.

2. The defendants have failed to deliver the goods or any of them in good order and condition or at all.

3. Alternatively, the *West Point* was unseaworthy and unfit

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for carriage of the goods on shipment and at the commencement of the voyage in the following respects:—A quantity of about 120 gallons of paraffin oil was stowed in the low pressure column on the starboard side of the engine room aft; the cock at the base of the column was leaking heavily both at the nozzle and at the shoulder where it was fixed to the boss of the column; the guard at the top was not soldered on; the cock was weak and cracked at the shoulder; it was improperly fixed to the column by a spigot or nipple screwed at one end into a thread in the shoulder of the cock and at the other end into the boss of the column; the screws and threads were insufficient and worn. Alternatively, the cock was flawed or fractured at the shoulder.

4. On August 27, 1910, while G. J. Westlake, second engineer, was attempting to stop the leak at the shoulder of the cock the cock came off or broke off, the paraffin escaped and became ignited, and the vessel took fire and foundered with the goods on August 29, 1910.

The plaintiffs claimed the value of the goods, 11,785*l*.

The points of defence, so far as is material to this report, were as follows:—

1. The defendants admit paragraphs 1 and 2 of the points of claim save as to the plaintiffs' interest.

2. The defendants admit that on August 27, 1910, the *West Point* took fire and that by reason thereof the said ship and the plaintiffs' goods were lost on August 29, 1910. The said fire and consequent loss of goods happened without the actual fault or privity of the defendants, and they will contend that by reason of s. 502 of the Merchant Shipping Act, 1894 (1), they are not liable to make good the said loss.

3. The defendants deny that the *West Point* was unseaworthy or unfit for the carriage of the goods as alleged or at all.

By paragraphs 4 and 5 the defendants alleged, alternatively,

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the

following cases; namely—

"(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

that by the terms of the bill of lading under which the said goods were shipped the defendants were exempted from liability for the loss.

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The clause in the bill of lading relied on by the defendants was as follows :

“The shipowners ^{and}_{or} charterers are not responsible for any loss, detention of or damage to the goods, or the consequences thereof, or expenses occasioned by any of the following causes, viz.— . . . fire on board, in hulk, in craft, or on shore; explosions, heat, defects in hull, tackle, engines, boilers, machinery or their appurtenances, or accidents arising therefrom; perils of the seas . . . and all accidents of navigation . . . ; nor for any act, neglect, or default of the pilot, master, crew, stevedores, engineers, or agents of the shipowners; . . . or by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever.”

The bill of lading also provided that “the shipowners ^{and}_{or} charterers are not liable for gold, silver, specie, bullion . . . notes, bills, securities or documents of any description; . . .”

An order was made that the following questions be tried as preliminary questions of law:—

1. Whether the defendants can rely on s. 502 of the Merchant Shipping Act, 1894, in answer to the plaintiffs' claim based on unseaworthiness set out in paragraphs 3 and 4 of the points of claim.

2. Whether the defendants are precluded from setting up the said section by reason of the special contract contained in the bill of lading.

Atkin, K.C., and *M. Hill, K.C.* (*R. A. Wright* with them), for the plaintiffs. The common law obligations of a shipowner with regard to the carriage of goods are to deliver the goods at all costs, to use due care by himself and his servants, and to provide a seaworthy ship, that is to say, a ship reasonably fit for the carriage of the particular goods. The first and second of these obligations are qualified by s. 502 of the

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1911 Merchant Shipping Act, 1894, which relieves the shipowner from liability for damage happening, without his actual fault or privity, by reason of fire occurring in the course of carriage; but the obligation to provide a seaworthy ship is in no way affected by s. 502. The ordinary excepted perils in a bill of lading do not exclude the primary obligation to provide a seaworthy ship: *Steel v. State Line Steamship Co.* (1); and similarly the statutory limitation of liability in the case of fire does not avail the shipowner if the fire is the result of the ship being unseaworthy; otherwise a shipper of goods would have no redress if a shipowner took his goods on board a ship on which a fire had already broken out. This question arose in *The Diamond* (2), but it became unnecessary to decide it because it was found as a fact that the ship in that case was not unseaworthy. It seems clear, however, from the judgment delivered by Bagnall Deane J. that if the fact had been otherwise he would have held that unseaworthiness deprived the shipowner of the protection of s. 502. This view is supported by a consideration of the previous legislation on the subject: see 7 Geo. 2, c. 15; 26 Geo. 3, c. 86; the Merchant Shipping Act, 1854, s. 503. [They referred to *Forward v. Pittard* (3) and *Queensland National Bank, Ltd. v. Peninsular and Oriental Steam Navigation Co.* (4)]

Secondly, assuming that the construction sought to be placed on s. 502 by the plaintiffs is wrong, and that a shipowner is by that section exempt from liability for damage by fire even though the fire is due to his failure to provide a seaworthy ship, nevertheless it is always possible for a shipowner to waive the statutory exemption by entering into a special contract with the shipper of goods: *The Satanita*. (5) By the terms of the bill of lading in this case the defendants are relieved from responsibility for any loss by fire, and although it is clear that the exceptions in the bill of lading do not exclude the primary obligation to provide a seaworthy ship, except as qualified by the exceptions in the bill of lading itself, yet the fact that the defendants have by their

(1) (1877) 3 App. Cas. 72.

(3) (1785) 1 T. R. 27.

(2) [1906] P. 282.

(4) [1898] 1 Q. B. 567.

(5) [1897] A. C. 59.

contract dealt with the question of their liability for fire shews that it was the intention of the parties that the defendants should not also retain the protection afforded by s. 502. This intention is further shewn by the fact that the bill of lading protects the defendants against loss of money or securities, which is also dealt with in s. 502.

Sir R. B. Finlay, K.C., and *Bailhache, K.C.* (*Dawson Miller* with them), for the defendants. It is impossible on any canon of construction to read s. 502 as being subject to an implied exception as to unseaworthiness. The section contains express exceptions, namely, where the loss or damage happens with the shipowner's actual fault or privity, and, therefore, no further exceptions can be implied. In *Steel v. State Line Steamship Co.* (1) it was held that a clause in a bill of lading exempting the shipowner from liability for the negligence of his servants did not exonerate him from the duty of providing a seaworthy ship, but the principle of that decision cannot be applied to the construction of a section of an Act of Parliament, for the statute must be deemed to have dealt with the whole position, and s. 502 provides for the complete immunity of the shipowner in the case of damage by fire except in the two cases mentioned of his actual fault or privity. In s. 503, which limits the amount of a shipowner's liability in case of loss of life and damage to goods, the same words "without their actual fault or privity" are to be found, but it has never been and cannot be suggested that a shipowner is deprived of the protection of that section if his ship was unseaworthy. *The Diamond* (2) is not an authority on the meaning of s. 502, for the decision turned entirely on the facts. The point was not raised in *Queensland National Bank, Ltd. v. Peninsular and Oriental Steam Navigation Co.* (3)

Secondly, it is not disputed that parties may by a special contract oust the operation of a statute if they use appropriate language, but in the present case they have not done so. The exception of unseaworthiness in the bill of lading is in favour of the shipowner and applies to protect him from liability (provided all reasonable means have been taken to provide against

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unseaworthiness) in cases where the law would otherwise impose a liability for unseaworthiness. In other words the exceptions are only intended to protect the shipowner from liability in cases where, but for the exceptions, he would be liable; and if the defendants are right as to the first point and are protected by s. 502 from liability for fire caused by unseaworthiness, they cannot be made liable under the exceptions in the bill of lading. The plaintiffs' contention involves the conversion of a negative stipulation in limitation of the shipowner's liability into an affirmative stipulation extending that liability to cases in which liability would not otherwise exist. This bill of lading cannot be read as affirmatively imposing on the shipowner a liability for fire caused by unseaworthiness provided the shipowner has not used reasonable care. "Exemptions from liability established by statute apply, notwithstanding the form of the bill of lading": *Carver's Carriage by Sea*, s. 76; *Baxendale v. Great Eastern Ry. Co.* (1); *Wahlberg v. Young*. (2)

Atkin, K.C., replied.

Cur. adv. vult.

1911. Oct. 23. BRAY J. read the following judgment:—In this case the point in dispute is whether the liability of the defendants for damage by fire to the plaintiffs' goods is to be governed by the provisions of s. 502 of the Merchant Shipping Act, and two questions have been formulated for my decision. They are—whether the defendants can rely on s. 502 in answer to the plaintiffs' claim based on unseaworthiness as alleged in the points of claim, and whether the defendants are precluded from setting up the section by reason of the special contract contained in the bill of lading.

The first question is based on the assumption that the contract for the carriage of the goods by the ship in question contained no special terms relating to damage by fire; the second is based on the assumption that the goods were carried on the terms of the bill of lading referred to in the pleadings.

If the plaintiffs are right as to either of the questions, for the purpose of to-day they succeed. I have come to the conclusion

(1) (1869) L. R. 4 Q. B. 244.

(2) (1876) 45 L. J. (Q.B.) 783.

that on the second point they are right, and, therefore, it might be unnecessary for me to answer the first question ; but as it has been argued I think I had better state the opinion I have formed, although I cannot say that I am very confident that I am right. The question is undoubtedly a difficult one.

The plaintiffs' contention is this : their claim, they say, is for damages for breach of the warranty of seaworthiness, and the section does not touch that warranty. The section is to be treated as creating an excepted peril, and according to *Steel v. State Line Steamship Co.* (1) excepted perils in a bill of lading do not, as a rule, relieve the shipowners from the consequences of a breach of the warranty unless so expressly provided. The defendants say that the words are perfectly general, and apply to all cases where there has been damage to goods on board by fire, and that to construe them in the way suggested would be to add to the section the words "unless caused by unseaworthiness."

I have been referred to previous Acts, first the Act of George III. The section there has a similar ambiguity and does not help me. The Act of 1854 contains a section in which almost the same language is used as in the Act of 1894. No doubt the Act of 1894 was to a large extent a consolidating Act. In 1854 the law was not as clearly settled as it has been since. It had, of course, been settled that there was the warranty of seaworthiness, but it was not, perhaps, fully realized how extensive that warranty was, and that it involved the obligation that the ship was properly protected against fire. Nor had it been decided that the excepted perils did not relieve the shipowners from the consequences of breach of the warranty. I think it is quite possible that the Legislature in 1854 had not in view the particular case which has arisen here.

Under these circumstances I think my duty is to give to the words of the section their most literal interpretation. [The learned judge read the section, and continued :] Construed literally I think these words apply whenever there has been damage to goods by fire without the shipowners' actual fault or privity, and that whether there has been a breach of the warranty of

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seaworthiness or not. This section is intended to apply in the absence of special provisions. There is always, in the absence of some special provision in a contract of carriage by sea in a ship, a warranty of the seaworthiness of the ship, and therefore the section is intended to apply to a contract where there is such a warranty, and therefore in the absence of some special provision I think it applies even though there has been a breach of the warranty; in effect it limits the liability for such a breach. I think the fact that the following section, which limits the damages, clearly applies to damage consequent on breach of the warranty tends to confirm the view I have taken. I think I must answer the first question in favour of the defendants.

I come now to the second question. It is conceded that it is open to the parties to exclude the section by their contract. *The Satanita* (1) is sufficient authority on that point. That case also decides that the section need not be excluded in so many words; it is sufficient if it appears from the contract between the parties that they intended to exclude it. It becomes, therefore, a question of what is the true construction of this bill of lading.

Now in this bill of lading we have this provision, that the goods are to be delivered in the like good order and condition subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract of freight between the shipowners, shippers, and consignees. I think this is a strong indication that the bill of lading contains all the terms; if not in every case, at all events where those terms deal with a particular subject-matter. Now, there are three possible cases of damage by fire: (1.) where it is caused by accident; (2.) where it is caused by the negligence of the master or crew, or indeed of any one except the owner himself; and (3.) where it is caused by some negligence or fault on the part of the owner. The bill of lading deals with each of these cases. The statute does the same. They both cover the same subject-matter. I think the parties, by providing expressly for each of these cases, have shewn their intention to substitute their own provisions for the provisions of the statute. I think the fact that they followed the same course with regard to robbery tends to shew the same intention.

(1) [1897] A. C. 59.

It was strongly pressed on me that the provision in the bill of lading with regard to unseaworthiness is negative and not affirmative; but the parties are dealing with excepted perils, and the form in which the earlier part of the clause is drawn made it more natural to put it in a negative form. Any one, I think, reading the clause would conclude that it was clearly intended that the owner should be liable in case he had failed to take reasonable means to provide against unseaworthiness. My answer, therefore, to the second question is in favour of the plaintiffs.

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Judgment accordingly.

The defendants appealed and the plaintiffs gave notice of a cross-appeal. The appeals were heard on November 20 and 21.

Sir R. B. Finlay, K.C., Bailhache, K.C., and Dawson Miller, for the defendants.

Atkin, K.C., M. Hill, K.C., and R. A. Wright, for the plaintiffs.

[The arguments were to the same effect as in the Court below. The following additional cases were cited:—*Smitton v. Orient Steam Navigation Co.* (1); *Tattersall v. National Steamship Co.* (2); *Lyon v. Mells* (3); *Amies v. Stevens.* (4)]

Nov. 22. VAUGHAN WILLIAMS L.J. read the following judgment:—This is a case in which two preliminary questions were ordered to be tried before the trial of the action.

The action is an action against shipowners for non-delivery of sulphate of ammonia shipped on board the steamship *West Point*. The preliminary questions are the following:—1. Whether the defendants can rely on s. 502 of the Merchant Shipping Act, 1894, in answer to the plaintiffs' claim, based on unseaworthiness, set out in paragraphs 3 and 4 of the points of claim. 2. Whether the defendants are precluded from setting up the said section by reason of the special contract contained in the bill of lading.

(1) (1907) 12 Com. Cas. 270.

(2) (1884) 12 Q. B. D. 297.

(3) (1804) 5 East, 428.

(4) (1718) 1 Str. 128.

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As to the first question, I agree entirely with Bray J. If you read the general words of s. 502 as qualified or limited by the warranty of seaworthiness implied by law, to so hold would be to change the words of the section from "a British sea-going ship" into "a British sea-going seaworthy ship." [The Lord Justice read s. 502 of the Merchant Shipping Act, 1894, and continued:]

I think that this section by clause 1 exonerates the ship-owner from both the common law liability in cases of loss from fire and, what is perhaps more important in this case, from liability for loss of goods from fire, even though the cause of the fire may be the unseaworthiness of the ship. The answer to the first question is based on the assumption that the contract for the carriage of the goods by the ship in question contained no special terms relating to damage by fire. Bray J. deals with the second question on the assumption that the goods were carried on the terms of the bill of lading referred to in the pleadings, and on this assumption comes to the conclusion that the plaintiffs are right, because the defendants are precluded by reason of the special contract contained in the bill of lading from setting up s. 502 in answer to the claim of the plaintiffs.

The question is, as Bray J. says, a difficult one. I have had great doubts in the course of the argument as to the proper answer to the second question, and have been not a little influenced towards the conclusion at which I have arrived by the opinion of Kennedy L.J., whose experience and knowledge of the course of decision on questions of merchant shipping is very great. My doubts have arisen, not only on the question whether, according to the true construction of the bill of lading, its provisions are so inconsistent with s. 502 as to warrant the conclusion that the parties to the contract of freight intended to preclude the shipowners from setting up s. 502 as an answer to the claim of the plaintiffs in respect of the non-delivery of the goods on board the ship destroyed by fire, but have arisen also in respect of the question whether, when the terms of the contract contained in the bill of lading relied on as precluding the defence based on the statute are ambiguous, the statutory defence ought to be excluded, or whether the statutory defence only ought to be

excluded when the intention to exclude is made plain by the terms of the bill of lading.

I know of no direct authority on the point, but I gather from the arguments of counsel on both sides that it was not substantially contested that, however difficult and ambiguous the construction of the bill of lading may be, yet if the conclusion of an intention to exclude the statute can be reasonably arrived at, that is sufficient to exclude the statute. The points on the bill of lading in favour of exclusion are, first, that the bill of lading says that the said goods are to be delivered in good order and condition subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract of freight between the shipowners, shippers, and consignees.

Then the clause, negating the responsibility of the shipowner for loss or damage to goods occasioned by any of the following causes, expressly mentions fire on board, which was unnecessary if reliance was intended to be placed on the statute, although some effect might be given to the clause in respect of matters outside s. 502, e.g., where the loss did not occur without the actual fault or privity of the shipowner. Again the last words of the catalogue of causes set out in the clause are "by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever." The words of the proviso are certainly very different from and inconsistent with the words "without his actual fault or privity" which constitute a proviso on the general words of the section.

I only mention these points as being the most salient, for there were other points based on the words in the bill of lading which were urged upon us by the counsel for the respondents. It must always, however, be remembered that the whole of the clause on the face of it seems to be intended to be in favour of the shipowner, and in that sense to point rather to the extension of the protection afforded by the section and not to its exclusion. Mr. Bailhache, in his admirable argument on behalf of the appellants, accepted the proposition that what he was arguing for amounted to a contention that the section would prevail, even though the

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cause of the fire was the unseaworthiness of the ship and all reasonable means had not been taken to provide against the unseaworthiness and such unseaworthiness was the cause of the fire, the immediate cause of the loss being the fire and not the unseaworthiness. He pointed out that the words of the bill of lading relied on by the respondents were negative and not affirmative words, which one would have expected if the intention was to exclude the operation of the section.

On the whole, I have come to the conclusion, not without doubt, that the decision of Bray J. on the second question was right, and our judgment must be for the respondents, and the appeal dismissed with costs.

BUCKLEY L.J. There were two questions to be decided in this case by the learned judge in the Court below. At the commencement of his judgment, after reading the questions, he said: "The first question is based on the assumption that the contract for the carriage of the goods by the ship in question contained no special terms relating to damage by fire. The second is based on the assumption that the goods were carried on the terms of the bill of lading referred to in the pleadings." That I think was quite right. In fact counsel have argued it before us upon that footing, and I propose to answer the two questions upon the assumptions there made. I think it would have been better if the order as drawn up had introduced some words expressing this assumption, and that the learned judge's answer to the first question would have been more aptly expressed by saying "upon the assumption that the contract contained no special terms relating to damage by fire, then answer the first question in the affirmative." It is clear, however, that that is what he meant.

The first question is as regards the true construction of s. 502 of the Merchant Shipping Act, 1894. Apart from statute a shipowner was at common law under two liabilities, the one that of an insurer arising from the fact that he was a carrier, and therefore bound to produce the goods which had been entrusted to him for carriage, and the other under an implied warranty of seaworthiness. The statute in the case of fire, if I rightly understand it, relieves him from both the first and the

second of those liabilities, if the fire happens without his actual fault or privity. It relieves him not only from the liability as an insurer but also from the liability under an implied warranty of seaworthiness. To express the same thing in other words, the section is not to be read as if it said "the owner of a seaworthy British sea-going ship"; it is, "the owner of any British sea-going ship," be it seaworthy or unseaworthy, "shall not be liable" for damage by fire unless it happens with his actual fault or privity. That is the construction which I place upon the statute. If there is no special contract, the defendants can rely on the statute construed as I have construed it. That answers the first question. But in that state of things, and the liability of the shipowner being such as I have stated, the contract was made which is contained in this bill of lading. I think the true construction of the contract is this. I read it as if the shipowner had said "I know that I am under these two liabilities, the one as insurer, the other under an implied warranty of seaworthiness, and I further know that in respect of both those liabilities I have the benefit of s. 502 of the Merchant Shipping Act, unless I contract myself out of the statute"; it is common ground it is competent for him to do so if he chooses to do so, and if he uses apt words. That being the state of affairs, the bill of lading commences by saying that the shipowner is to deliver the goods "in the like good order and condition." If it stopped there he would be liable under both heads of liability, subject to the protection afforded by the statute. But it says further that he is to do that "subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract of freight." I have therefore to see whether the liability thus assumed with the protection which the statute has given him is varied in any way by the clauses and conditions of this special contract. There is one clause on which, in my opinion, the whole contest arises. It is a long clause commencing with the words "The shipowners and/or charterers are not responsible" and ending with the words "unseaworthiness or by any other cause whatever." I read that clause as divided into two parts; the first part is the whole of the clause with the exception of the last line and a half; the second part is the last line and a half. That second

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part is addressed to unseaworthiness. It is in these words: "shall not be responsible for damage to goods by unseaworthiness of the ship at the commencement of or at any period of the voyage provided all reasonable means have been taken to provide against such unseaworthiness." It then concludes with the words "or by any other cause whatever." By that portion of the clause it seems to me that the shipowner was contracting as to what was to be his liability under the head of implied warranty of seaworthiness, and his whole liability in respect of that is defined there. The earlier part of the clause is, in my opinion, to be read as if it said "As for unseaworthiness, I am going to deal with that presently. In this first part of the clause I am not going to deal with it at all. For the first part of this clause I am content to take it that my ship is to be a seaworthy ship." I think that part of the clause expresses this: "if my ship is seaworthy, my contract is that I shall not be liable for fire on board as insurer against fire, and that exemption from liability is to apply not only in the cases mentioned in s. 502 of the statute, but in any case whatsoever." Having said that, he has finished with his liability as insurer. Then he proceeds to deal with his liability under the implied warranty of seaworthiness, and the next words, I think, define all his responsibility in respect of that. He says "I will not be liable for unseaworthiness provided all reasonable means have been taken to provide against such unseaworthiness." These last words are negative words, but I think they are pregnant words, and infer an affirmative. In that clause he has in effect said "I will be liable for unseaworthiness if I have not taken all reasonable means to provide against unseaworthiness."

The particular question which we have here to consider was put most plainly by Mr. Bailhache in commencing his argument. For the purpose of raising the point make the hypothesis that a fire has occurred by unseaworthiness against which reasonable precautions have not been taken, adding, however, that that fire happened without the shipowner's actual fault or privity. Under those circumstances is he liable? Is the shipowner entitled to say "This fire did not happen with my actual fault or privity.

Therefore by reason of s. 502 I am not liable, although I agree that I failed to take all reasonable precautions to provide against such unseaworthiness, and that the fire resulted from my so failing." To my mind the terms of the contract prevent the shipowner from being entitled to say that.

I think, therefore, that both questions were rightly answered by Bray J. No difficulty occurs as to one conflicting with the other, if one bears in mind that the first question is put on one assumption and the second question on another assumption.

In my opinion the first question was rightly answered in the affirmative upon the assumption on which it is made, and the second question was also rightly answered in the affirmative upon the words of the contract.

For these reasons I think that the appeal and the cross-appeal ought to be dismissed.

KENNEDY L.J. This is unquestionably a difficult case, but it has been argued so thoroughly by the learned counsel on both sides that I know that I should gain nothing by further consideration.

There are two questions which were before the learned judge in the Court below. If the first of those questions had been answered by him differently, if he had held that the words of s. 502 of the Merchant Shipping Act, 1894, in regard to the liability of a shipowner in the case of a fire were to be read in a sense unfavourable to the case of the shipowners, there would be nothing further to be said on their behalf, but the learned judge has answered that question in their favour. Dealing with that question first, I think, speaking for myself, that it constitutes the more doubtful part of this case. There is, in my judgment, a great deal to be said for the view that the Legislature did not lose sight of the law which unquestionably had been settled before the date of the statute, that there is in every contract with regard to the carriage of goods by sea an absolute warranty that the carrying vessel must, at the time of sailing with the goods, have that degree of fitness as regards both the safety of the ship and also the safe carriage of the cargo in the ship which an ordinarily careful and prudent

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owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature. It is possible, and I think my brother Bray had that fully in his mind when he used the language that he did in his decision upon the section, that one not unreasonably might come to the conclusion that the implied warranty of seaworthiness was not intended to be, as it were, abrogated by the section in regard to damage by fire, and that the exemption from liability, to the extent to which that section gives it, is an exemption which was intended to relate to fire occurring after the commencement of the voyage on such a seaworthy ship. In the case of small ships, the owner may be actually the fitter out of the ship, or sail himself as the master for the voyage. Of course, if that view were taken and the section was read subject to the implication of the reservation of the warranty of seaworthiness, there could be no further contest on behalf of the shipowners; but I am not prepared to differ from Bray J.

Upon the whole, I think that he has come to that which is, from the lawyer's point of view, the more correct conclusion, for one good reason, that the words are unqualified in their terms, and, as has been pointed out by Vaughan Williams L.J. and by Buckley L.J., and also by Bray J., if you are to read the implication into the section, you are virtually reading in the word "seaworthy" in addition to the word "sea-going" as the epithet of the vessel. On the whole I think it is the better conclusion that this section is to be read without any qualification that the vessel should be seaworthy at the commencement of the voyage.

Assuming the first question to be answered in favour of the shipowners, we come to the second question, which is also, I think, a difficult question to answer; but I am of opinion that the view which Vaughan Williams L.J. and Buckley L.J. have expressed here in concurrence with that expressed by Bray J. in the Court of first instance is right. Without analysing in detail the language of an ungrammatical document, I have come to a conclusion, which I can state in very few words, as to the real meaning and effect of the clause in the bill of lading

containing the exceptions as to fire on board and unseaworthiness. It appears to me that the contention of the shipowners with reference to the terms as to unseaworthiness in the clause in question compels them to say that those terms as to liability for unseaworthiness which are unquestionably of effect in relation to matters arising in connection with the other perils mentioned do not constitute a contract between the parties in regard to fire. Indeed, it was argued for the shipowners that the provision as to liability for unseaworthiness has so much that it can unquestionably operate upon in regard to the other perils that it need not be treated as having any relation to the words "fire on board." It was said that the words "fire on board" were in fact redundant. I cannot, however, treat the words as superfluous when in the natural concatenation of the sentences of the clause I find no distinction drawn between fire on board and the other perils; and, when it is conceded that the part of the clause dealing with unseaworthiness and the liability to a limited extent of the shipowner therefor has a reference to all the other perils, I cannot construe the clause in such a way as to say that because liability for fire on board of the carrying ship is dealt with by the statute I am to treat that part of the clause as having a negative or qualifying effect in reference to all the other causes of danger, with the exception of fire. It is not as if the Act of Parliament had itself dealt in terms with the liability of a shipowner for fire caused by unseaworthiness; on the contrary, the argument for the shipowners is that it has not done so, but has placed a totally different limitation upon the shipowner's liability by exempting him from liability for fire unless caused, not by unseaworthiness, but by his actual fault or privity.

I am therefore unable to accept the view that fire is dealt with in this clause in a different way from the other perils, and, that being so, I am led to hold that the provision as to unseaworthiness, which, it is conceded, constitutes a contract between the parties, has its application to the case of fire as well as to the case of other perils. If this is correct we find in this bill of lading a contract relating to the liability of the shipowners for fire caused by unseaworthiness. That is the same position as

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C. A. had to be considered by the House of Lords in *The Satanita*. (1)
 1911 It is true that the language used as to the liability for unsea-

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worthiness is negative in form, but I do not think that that really affects the question. In *The Satanita* (1) the question was whether a contract to pay for all damage excluded the provisions of the Merchant Shipping Act, 1894, as to limitation of liability, and it was held that if the language of the contract was sufficiently clear it had that effect. So here I find an express contract dealing with the extent of the shipowner's liability for unseaworthiness in relation to certain named perils, including fire, and applying the reasoning of the House of Lords, we ought, in my opinion, to give effect to that contract as excluding the provisions of s. 502. For these reasons I agree with the answer given by Bray J. to the second question.

Appeal and cross-appeal dismissed.

Solicitors for plaintiffs: *Parker, Garrett & Co.*

Solicitors for defendants: *W. A. Crump & Son.*

(1) [1897] A. C. 59.

F. O. R.

[IN THE COURT OF APPEAL.]

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[1911 V. 393.]

Bankruptcy—Provable Debt—Liability capable of being fairly estimated—Annuity payable to Wife under Separation Deed—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37.

By a separation deed, made in 1905, the husband covenanted with the wife, and also with the trustee, that the child of the marriage should spend part of his vacations with the wife, and that the husband would maintain, clothe, and educate the child, and that he would pay the wife an annuity of 156*l.* during her life. The wife and the trustee jointly and severally covenanted with the husband to keep him at all times indemnified against all her debts, torts, and liabilities; and that the wife would not molest the husband. The covenants were to become void on the married parties resuming cohabitation.

In 1911 the husband was adjudicated a bankrupt:—

Held, reversing the decision of Darling J., that, as the annuity was provable in the bankruptcy, the wife could not maintain an action on the covenant to pay it against the husband, notwithstanding she had not elected to prove.

Ex parte Neal, In re Batry (1880) 14 Ch. D. 579, and *Ex parte Bates, In re Pannell* (1879) 11 Ch. D. 914, followed.

Linton v. Linton (1885) 15 Q. B. D. 239, distinguished on the ground that there the claim was for alimony.

In this case the plaintiff, a married woman, sued her husband for the amount alleged to be due under a covenant in a separation deed between them, dated February 18, 1905, whereby the defendant covenanted to pay the plaintiff the sum of 156*l.* per annum by weekly payments of 3*l.* in advance. She claimed 3*l.* as due on September 19, 1910, and 66*l.* for twenty-two weekly sums due from January 28 to June 24, 1911.

The parties to the deed were the defendant, the plaintiff, and N. Abrahams, the trustee. The defendant covenanted with the plaintiff and separately with the trustee (1.) (a) that the plaintiff might live apart from the defendant; (b) that the defendant would not molest the plaintiff; (c) that the child of the marriage should spend half his school vacation with the plaintiff and the other half with the defendant, who was to maintain, clothe, and

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educate him; (d) that the defendant would yearly during the plaintiff's life pay to her the clear annuity of 156*l.* by equal weekly payments of 3*l.* in advance for her separate use, the first apportioned payment being made on the execution of the deed.

By clause 2 the plaintiff and the trustee jointly and severally covenanted with the defendant (a) at all times thereafter to keep the defendant, his heirs, executors and administrators, indemnified against all debts, torts, and liabilities which the plaintiff might thereafter contract, and from all actions, claims, and demands on account thereof, and against all such costs, charges, losses, damages, and expenses whatsoever as might be incurred by the defendant on account thereof; (b) that the plaintiff would not molest the defendant; (c) that if the defendant should be called upon to pay and should pay any debt or liability contracted by the plaintiff the trustee might retain the amount with all costs, charges, and damages out of the annuity. By clause 4 the covenants were to become void on the plaintiff and defendant resuming cohabitation.

The defendant was adjudicated a bankrupt on March 21, 1911, and on June 27, 1911, obtained his discharge, which, however, was suspended for two years.

The action was tried on July 29, 1911, by Darling J. without a jury, when the learned judge gave judgment for the plaintiff for 69*l.* and costs, but ordered execution to be stayed in respect of the 69*l.* for so long as the defendant should pay to the plaintiff the sum of 2*l.* per week (the first payment to be made on Saturday, August 5, 1911).

The defendant appealed.

J. G. Trapnell, for the appellant. The arrears of the annuity were due in part before the defendant was adjudicated a bankrupt and in part afterwards, and judgment was given for the whole amount, but with a stay of execution so long as a smaller annuity was paid. Darling J. applied the words of Bowen L.J. in *Linton v. Linton* (1): "The very essence of it is, that it is a monthly or weekly payment for the personal maintenance of the wife. It seems to me that it would be the wildest construction of s. 37"—

of the Bankruptcy Act, 1883—"to say that future payments of that kind constitute a debt or liability capable of being proved in bankruptcy." But that was a case of alimony payable under an order of the Divorce Court on a judicial separation, and not an annuity under a separation deed.

Sect. 37, sub-s. 3, of the Act of 1883 provides that with certain exceptions, of which this is not one, "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order . . . shall be deemed to be debts provable in bankruptcy." and sub-s. 8, if anything, extends the meaning of "liability." In *Ex parte Neal, In re Batey* (1) the Court of Appeal held that an annuity payable under a separation deed was provable under the very similar words of s. 31 of the Bankruptcy Act, 1869. In *Morgan v. Hardy* (2) Bowen L.J. referred, without disapproval, to *Ex parte Neal, In re Batey*. (1) *Morgan v. Hardy* (2) was affirmed by the House of Lords as *Hardy v. Fothergill* (3), and there the widest interpretation was given to s. 31 of the Act of 1869.

In re Hawkins, Ex parte Hawkins (4) and *Kerr v. Kerr* (5) are both cases as to alimony, the amount of which may be varied by the Court, and shew the reasons why it is not provable.

Darling J. was impressed by the difficulty that after proving the parties might resume cohabitation and then the plaintiff would have proved for an amount which was not due, in fraud of the creditors. But this is a contingency which, like other contingencies, is recognized by the Act.

[He also referred to *Ex parte Bates, In re Pannell* (6), and was complimented by the Court on his able argument.]

R. Vaughan Williams, for the plaintiff. *Ex parte Neal, In re Batey* (1) is distinguishable, for there the wife had elected to prove in the bankruptcy and here she has not done so. Darling J. was right in saying that the Bankruptcy Act was not intended to make a wife entitled to an annuity under a separation deed put a valuation on the annuity and say she will take a fixed sum and give up all right to maintenance from her husband. The deed

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(1) 14 Ch. D. 579.

(2) (1887) 18 Q. B. D. 646, 655.

(3) (1888) 13 App. Cas. 351.

(4) [1894] 1 Q. B. 25.

(5) [1897] 2 Q. B. 439.

(6) 11 Ch. D. 914.

C. A. was entered into to regulate generally the marital relations
 1911 between the plaintiff and the defendant, and contains several
 VICTOR provisions besides those relating to maintenance. There are
 v. covenants as to molestation, and the custody of the child of the
 VICTOR. marriage, as well as a covenant by the trustee to indemnify the
 husband against the wife's debts. If the plaintiff is compelled to
 prove in bankruptcy, she will only get a small dividend, with the
 result that the defendant will escape from liability to maintain
 her, and the trustee will be liable—that is, on the assumption that
 the covenants are not dependent on each other.

[COZENS-HARDY M.R. I think the covenants are independent.]

The deed is primarily a contract relating to marriage, and the
 plaintiff is not merely a creditor, but is primarily a wife. Bank-
 ruptcy law is not intended to apply to a case of this class. The
 wife may elect to be a mere creditor, as in *Ex parte Neal*, *In re*
Batey (1), but she is not bound to do so.

In *Hardy v. Fothergill* (2) Lord Selborne says: "There may be
 contracts, such, for example, as a promise to marry (not broken),
 or a covenant not to molest and which on a fair interpretation
 of these words"—s. 31 of the Act of 1869—"ought to be excluded
 as having a different object from the payment of money in any
 contingency; although if they were broken a jury might award
 damages for their breach. I must guard myself against being
 supposed to lay down any rule applicable to cases of that kind,
 or to any others in which an injunction or specific performance
 would be the most proper remedy."

No reply was called for.

COZENS-HARDY M.R. This is an appeal from a decision of
 Darling J., who has held that a wife, who is a party to a
 separation deed, can recover judgment against her husband for
 the amount of the annuity provided by that deed, and claim the
 arrears, notwithstanding the bankruptcy—followed by the dis-
 charge, as I understand—of the husband. With great respect to
 the learned judge I am unable to assent to that view. It might
 suffice to say that it is not open to us to take any other
 view upon the point, having regard to the express decision of

(1) 14 Ch. D. 579.

(2) 13 App. Cas. 351, 360.

this Court in two cases, the case of *Ex parte Bates*, *In re Pannell* (1), and still more the case of *Ex parte Neal*, *In re Batey* (2), also in this Court. They were both cases under separation deeds, in which the decision of this Court was that under modern bankruptcy legislation, however difficult it might be to measure the liability incurred by a husband under a separation deed, the liability ceasing when cohabitation is resumed, still it was a liability which had to be estimated, and that if it could be estimated in no other way it must be left to a jury to estimate it.

Mr. Vaughan Williams, who has argued this case as well as it could possibly be argued, did not really seek to dispute the argument of the appellant in this case on that point. He admits that the decisions in *Ex parte Neal* (2) and in *Ex parte Bates* (1) bind us, but he says there are questions of public policy which are bound to come in quite apart from *Ex parte Neal* (2) and *Ex parte Bates* (1) and all the cases saying that the wife is entitled to come in and prove. He says those decisions have no force, in so far as they purport to bind the wife, if she does not elect to come in and prove. I cannot agree with that. It seems to me that the whole policy of the Bankruptcy Act is that the bankrupt is to get complete discharge from contractual obligations to pay sums of money, and the only right of the person under the terms of the contract, whatever the pecuniary claim is, is to come in. The extent to which that doctrine has been carried is made quite plain by the case of *Hardy v. Fothergill* (3) in the House of Lords, which puts, certainly, an extremely wide meaning on the words in the Bankruptcy Act, and decides that contingent future liability, however difficult it may be to assess, is something which must be taken to be capable of estimation, with one exception which is quite out of the case here, namely, where the Court of Bankruptcy may, under certain conditions, declare a liability to be incapable of being fairly estimated. But then it is said "Oh, but just look at the hardship upon the trustee in this case; the trustee has in fact said that if the husband does not make these payments the trustee will"; but the same might be said

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(1) 11 Ch. D. 914.

(2) 14 Ch. D. 579.

(3) 13 App. Cas. 351.

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of the ordinary case of principal and surety: if the principal becomes bankrupt the surety is still liable. Then it is said that the wife barter her rights for the sake of this covenant. I do not really care to consider that point. She may or may not have the right to pledge her husband's credit. On that I can say nothing, because it does not arise; but I do say in the present case that I am clearly of opinion that the contractual obligation was that the husband was to pay an annuity of 156*l.* a year by weekly payments of 3*l.* a week; that the contractual obligation has been turned into a right of proof; and therefore that no action can be maintained by the wife either for the arrears prior to the bankruptcy or for the rest of them.

I only wish to say one word about *Linton v. Linton* (1) and the subsequent cases of alimony. These decisions appear to me to turn upon entirely different grounds. Alimony is payable under an order of the Divorce Court, which order may be from time to time varied by the Court as the Court thinks fit having regard to the circumstances of the husband and the whole conditions of the case. The Court of Appeal has held in a decision which binds us that that is a pecuniary liability which is not the subject of proof in bankruptcy. The Courts have distinguished in clear terms the case of alimony from the case of an annuity under a separation deed. With great respect to the learned judge I think his decision is wrong, and that the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion, for the same reasons, and I will only add a few words with reference to the cases cited before us which relate to alimony. The mere fact that a man has become bankrupt does not free him from his obligation to support his wife, and an order for alimony is an act of the Divorce Court enforcing that surviving obligation. The amount of such alimony is determined by the circumstances of the moment, and from time to time the Court can vary the amount of alimony which is to be paid. Moneys payable, therefore, under orders for alimony stand in a totally different position from moneys payable under a contract such as a separation deed. I have no doubt whatever that the intention of the

(1) 15 Q. B. D. 239.

Bankruptcy Act was to grant the bankrupt a discharge from all pecuniary liabilities arising contractually, and it is entirely immaterial whether or not the persons who have claims against him choose to prove or not to prove in the bankruptcy. The contention, therefore, which Mr. Vaughan Williams has raised to the effect that there is a difference between the cases of *Ex parte Neal* (1) and *Ex parte Bates* (2) and the case before us has, in my opinion, no foundation.

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FARWELL L.J. I am entirely of the same opinion. I think it is not open to us to entertain the question raised by the respondent in this Court. We are bound by the decisions cited by the Master of the Rolls so far as an annuity under a separation deed is concerned, and we are equally bound by the decision of this Court so far as alimony is concerned. The two stand on entirely different footings. I may add that it has been decided that alimony is inalienable, and is a purely personal allowance: see *Watkins v. Watkins*. (3)

Appeal allowed.

Solicitor for appellant: *H. Vaughan Whitehead*.

Solicitors for respondent: *Colyer & Colyer*.

(1) 14 Ch. D. 579.

(2) 11 Ch. D. 914.

(3) [1896] P. 222, 226.

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Dec. 7.

MENTORS, LIMITED v. EVANS.

*County Court—Practice—Remitted Action—Costs of Proceedings under Order XIV.
—Discretion of Judge as to—County Courts Act, 1888 (51 & 52 Vict. c. 43),
ss. 65, 113, 116.*

In an action brought in the High Court the plaintiff applied for summary judgment under Order XIV. The defendant obtained leave to defend as to part of the claim on the terms of his paying the balance to the plaintiff forthwith, and the action was remitted to the county court. The defendant paid the balance and the action proceeded. At the trial judgment was entered for the defendant with costs on the higher scale:—

Held, that the costs of the action prior to remittal were “not otherwise provided for” by the County Courts Act, 1888, and that the Court had a discretion under s. 113 of that Act to order the plaintiff to pay to the defendant the costs of the proceedings under Order XIV. notwithstanding that the plaintiff had by those proceedings succeeded in obtaining satisfaction of a portion of his claim.

APPEAL from the Chester County Court.

The plaintiffs brought the action in the High Court to recover a sum of 20*l.* 9*s.* 11*d.* for goods sold, and applied for summary judgment under Order XIV. The defendant in his affidavit in answer to that application admitted his liability for 3*l.*, and expressed his readiness to pay that sum to the plaintiffs or into Court as might be ordered. The Master made an order that the defendant should pay 3*l.* to the plaintiffs within two days, otherwise the plaintiffs to be at liberty to sign judgment for that amount, leave to defend as to the balance, the action to be remitted to the county court. The defendant duly paid the 3*l.* to the plaintiffs, and the action proceeded in the county court for the balance. At the trial the judge gave judgment for the defendant with costs on the higher scale. On taxation on that judgment the registrar allowed the defendant his costs of the proceedings prior to the order remitting the action to the county court, and on appeal the county court judge affirmed that order. The plaintiffs appealed.

Lort Williams, for the plaintiffs. The judge has held the plaintiffs liable to pay the defendant's costs of the proceedings under Order XIV., on which the plaintiffs succeeded to the extent

of 3*l*. It may be that they were not entitled to recover any costs of those proceedings, but they were not liable to pay any. The discretion over costs given to the Court by s. 113 of the County Courts Act, 1888, is limited to costs not otherwise provided for by that Act. These costs of the proceedings in the High Court were provided for by s. 65, which says that where an action commenced in the High Court has been remitted to the county court "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." It is true that in *Everall v. Brown* (1) it was held by the Court of Appeal that that provision of s. 65 did not take away the general discretionary power of the county court judge over the costs, but the Court were there dealing only with the costs incurred subsequently to the order of remittal: they did not decide that the county court judge had any discretion over the costs incurred in the High Court. The only authority which apparently supports such a contention is *Bennett v. Drake*. (2) There, an action having been remitted to the county court, the defendant paid a sum of money into Court under s. 107 of the County Courts Act, and it was held that the county court judge had a discretion over the costs in the High Court prior to the remittal. But s. 107 provides that a defendant when paying money into Court shall also pay in a sum in satisfaction of the plaintiff's costs up to that date. The sum therefore paid in must be assumed to have included those costs; in which case there were no costs in the High Court left to adjudicate upon. That case consequently affords an apparent rather than a real support to the respondent. Further the costs here are also provided for by s. 116. If the County Courts Act did not exist the plaintiff on recovering 3*l*. under Order xiv. would get his costs of those proceedings, and the defendant would not. And s. 116, which takes away the plaintiff's right to costs in such a case, must be read as saying that, except so far as it deprives the plaintiff of costs, it leaves the law as it stood before,

(1) [1906] 2 K. B. 884.

(2) (1907) 97 L. T. 132.

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including the inability of the defendant to have costs where the plaintiff recovered any sum however small.

Barrington Ward, for the defendant. The judge had jurisdiction to make the order appealed from. The costs in the High Court are not otherwise provided for by the Act. That s. 65 does not in any way fetter the discretion of the Court over the costs of a remitted action is concluded by *White v. Cohen* (1) and *Everall v. Brown* (2); and the section in this respect treats the costs incurred both before and after the order of remittal as standing on the same footing. It expressly says that the action upon remittal is to be treated as if it had been originally brought in the county court, except that the costs incurred before remittal are to be on a different scale. Subject to that it is to be regarded as one continuous action. Nor does s. 116 provide for these costs. That section only deprives the plaintiff of costs in the event specified, it is silent as to the defendant's costs. In the absence of any order by the Master as to the costs of the proceedings before remittal they became costs in the cause, and therefore no special direction of the county court judge was necessary to entitle the defendant to them, for they followed the event which was in the defendant's favour.

BANKES J. In my opinion this appeal must be dismissed. The question is whether the county court judge had jurisdiction to make the order as to costs which he did. The action was brought in the High Court to recover a sum of 20*l.* 9*s.* 11*d.* Of that amount it was conceded by the defendant that he owed 3*l.* The only dispute was as to the balance. There was, however, no formal tender of the 3*l.*, and the action was commenced for the full amount. Proceedings were taken under Order xiv., and the Master made an order that the defendant should pay the 3*l.* to the plaintiffs within two days and that otherwise the plaintiffs should be at liberty to sign judgment for that amount, that the defendant should have leave to defend as to the balance, and that the action be remitted to the county court. The defendant duly paid the 3*l.* to the plaintiffs. The action came on in the county court, and the judge gave judgment for the defendant with costs

(1) [1893] 1 Q. B. 580.

(2) [1906] 2 K. B. 884.

on the higher scale. The registrar proceeded to tax on that judgment. The defendant carried in a bill of costs including certain items in respect of the Order xiv. proceedings. The registrar allowed those items, and the judge affirmed the allowance. It is from that order that this appeal is brought. The question of the judge's jurisdiction to make the order depends upon three sections of the County Courts Act, 1888, the governing section being s. 113. That section provides that "All the costs of any action or matter in the Court not herein otherwise provided for shall be paid by or apportioned between the parties in such manner as the Court shall think just." There is no question but that when once the action was remitted to the county court it became an action "in the Court," and the judge had a discretion over the costs of that action except so far as they were "otherwise provided for." And the question is whether the costs of the Order xiv. proceedings were otherwise provided for by the County Courts Act, 1888. It is said that they were so provided for by two sections. First it is said that s. 65 provides for them. That section, which deals with orders for the remittal of actions from the High Court to the county court, concludes with these words: "and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." It is on those words that the appellants rely. But that point has been already decided against them in *Everall v. Brown*. (1) There Lord Alverstone C.J. in the Divisional Court said: "It is nothing more than a direction to the taxing officers as to the scale which they shall apply in taxing the costs if costs are allowed at all, and if no special direction is given by the Court that they shall apply some other scale. It does not in any way fetter the discretion of the judge." And that view was affirmed by the Court of Appeal. The other section relied on was s. 116. It was contended that although that section did not expressly say that a plaintiff who recovered less than 20% should not be liable to pay costs to the defendant, its language implied it. But I cannot agree that any such inference is to be drawn from the language used.

(1) [1905] 2 K. B. 196; and in C. A. [1906] 2 K. B. 884.

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The section is expressly confined to depriving the plaintiff of his costs in certain events. It does not in any way deal with the question whether the judge may not in a proper case order the plaintiff to pay the defendant's costs. I think we must hold that the judge had jurisdiction to make the order which he did, and that the appeal therefore fails.

LUSH J. I am of the same opinion. Sect. 113 expressly gives the county court judge power to deal with the costs of any action not otherwise provided for; and the only question is whether the costs of the proceedings under Order xiv. in this case were otherwise provided for. Two sections have been relied on by the appellants. One is s. 65. But that section does not on the construction that has been placed upon it in the cases that have been cited to us "provide for" the costs incurred prior to the order remitting the action to the county court or for those incurred subsequently to that order, but only for the scale to be applied if there should be a taxation. It has therefore no bearing on the question that we have to decide. The other is s. 116. Now in the first place I have considerable doubt whether the words "If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds" apply to this case at all. I do not think the plaintiff here can be said to have "recovered" 3*l.* "in the action" within the meaning of that section. But assuming that the plaintiffs did recover the 3*l.* by means of the Order xiv. proceedings, how can it be said that the section has provided for the defendant's costs? It does not deal with them at all. Therefore the judge had a discretion to order the plaintiffs to pay these costs.

Appeal dismissed.

Solicitor for plaintiffs: *W. M. Pyke.*

Solicitor for defendant: *E. A. Fuller, for Brassey, Chester.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

SYMON & CO. v. PALMER'S STORES (1903), LIMITED.

1911
Dec. 11.

Practice—Application for Judgment under Order XIV., r. 1—Verification of Cause of Action—Insufficient Affidavit—Deponent unable to swear positively to Facts—Absence of Jurisdiction—Costs, Payment of forthwith—Order XIV., r. 9 (b).

Where, on an application for judgment under Order XIV., r. 1, the affidavit made for the purpose of verifying the cause of action is insufficient, as being made by a person, other than the plaintiff, who cannot swear positively to the facts, but can only depose thereto upon information and belief, and there is, therefore, according to the decision in *Lagos v. Grunwaldt* [1910] 1 K. B. 41, no jurisdiction to make an order for judgment under Order XIV., the case comes within Order XIV., r. 9 (b), and the defendant is entitled to an order for payment of costs of the application by the plaintiff forthwith.

So held by Vaughan Williams L.J. and Buckley L.J., Kennedy L.J. dissenting.

APPEAL from an order made by Bucknill J. at chambers on an application under Order XIV., r. 1, varying the order of a Master, as after mentioned.

The indorsement on the writ of summons in the action stated that the plaintiffs' claim was for 1328*l.* 6*s.* 4*d.*, money received by the defendants for the use of the plaintiffs.

The particulars indorsed, so far as material, were as follows: "1909, July 3 to 1911, March 18. To amount of cheques received by defendants of which the following are particulars . . . 1328*l.* 6*s.* 4*d.*" Then followed particulars, with dates and names of drawers, of a number of cheques drawn in favour of the plaintiffs, which were divided into two classes, namely, (1.) cheques drawn in favour of plaintiffs, or bearer, and crossed "not negotiable," and (2.) cheques drawn in favour of plaintiffs and crossed. In class (1.) were the following items, namely, three cheques drawn by the Bank of New Zealand, the total of which amounted to 48*l.* 0*s.* 2*d.*, and five cheques drawn by the Bank of New South Wales, the total of which amounted to 84*l.* 10*s.* 2*d.*, making altogether 132*l.* 10*s.* 4*d.*

The plaintiffs applied to a Master for leave to sign judgment under Order XIV., r. 1.

C. A. The plaintiffs' application to the Master was originally made
 1911 upon two affidavits sworn respectively by the manager of the
 SYMON & Co. plaintiffs' business on November 7 and 16, 1911, one being
 v. the ordinary affidavit in a general form (1), and the other being
 PALMER'S as follows (2):
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"(1.) In further reference to the cheques the subject of this action, and the particulars of which appear in the writ of summons herein, the said cheques were received by the plaintiffs in the course of their business as merchants and export agents from the respective drawers in payment for goods, and were handed by me as to some, and by my daughter Elizabeth Margaret Symon with my knowledge as to others, to the plaintiffs' then cashier, one Jonas, for payment into the plaintiffs' bank. (2.) The said Jonas in fraud of the plaintiffs never paid the cheques into the plaintiffs' bank, but I am informed and verily believe that the same were handed to, and came into the possession of, the defendants, who took them, and passed them through their own account at the London and South Western Bank, Hammersmith branch, and received the proceeds thereof. The said Jonas was not the payee of any of the said cheques, nor did his name appear anywhere thereon."

Upon the case coming before the Master, he adjourned it for a further affidavit by the plaintiffs' manager as to his means of knowledge. By an affidavit sworn on November 22, 1911, the plaintiffs' manager deposed as follows: "(1.) Referring to my two previous affidavits sworn in this action on the 7th and 16th days of November, 1911, respectively, I have ascertained from the Bank of New Zealand that the three cheques drawn by them mentioned in the indorsement of the writ of summons in this action were paid into the account of the defendants, by whom they were received from one Jonas of 63 College Court Hammersmith, who is the person named in my affidavit sworn herein on the 16th November, 1911. The said cheques have printed across them ' & Co. not negotiable,'

(1) See App. B to Rules of the Supreme Court, 1883, Part II., No. 23A.

(2) Only such parts of the affidavit

are set out as related to the portion of the claim for which the judge gave the plaintiffs leave to sign judgment as after mentioned.

and are also crossed with a rubber stamp 'London and South Western Bank Limited, Hammersmith Branch.' . . . (3.) The five cheques drawn by the Bank of New South Wales as mentioned in the said indorsement of the writ of summons in this action are respectively stamped with rubber stamps 'London and South Western Bank Limited, Hammersmith Branch,' 'not negotiable,' the former stamp being the same as those on the other cheques herein referred to, and I am informed by the said Bank of New South Wales that such cheques were paid into the account of the defendants with the London and South Western Bank Limited aforesaid." The before-mentioned cheques were produced and made exhibits to the affidavit. The defendants did not put in any affidavits.

The Master gave the defendants unconditional leave to defend, and gave certain directions as to the time within which the defence should be put in, and as to discovery of documents, and mode and place of trial. On appeal the judge varied the Master's order by giving the plaintiffs leave to sign judgment for 132*l.* 10*s.* 4*d.*, and giving the defendants unconditional leave to defend the action as to the residue of the plaintiffs' claim.

Compton-Smith, for the defendants. In this case the affidavits made by the plaintiffs' manager do not satisfy the requirements of Order xiv., r. 1. Where the affidavit is made by a person other than the plaintiff, he must swear positively to all the matters necessary to constitute a *prima facie* cause of action. The facts necessary to shew a *prima facie* cause of action in the plaintiffs are obviously not stated in these affidavits by a person who can positively swear to them. The plaintiffs' manager only deposes to them upon information and belief derived from persons whose names are not given. The statements by which it is sought to trace the proceeds of the cheques improperly disposed of by Jonas into the hands of the defendants are the merest hearsay, and the sources of the information upon which the deponent relies are really not given. The plaintiffs' manager was manifestly not in a position to swear positively to the facts. The provisions of Order xxxviii., r. 3, with regard to statements in affidavits as to belief do not apply to the affidavit for the

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C. A. purposes of Order xiv. The case clearly comes within the decision
 1911 in *Lagos v. Grunwaldt* (1), where it was held that upon an
 SYMON & CO. affidavit founded merely on information and belief there is no
 v. jurisdiction to make an order for judgment under Order xiv., r. 1.
 PALMER'S That being so, the order of the learned judge should be reversed,
 STORES and the plaintiff ought to pay the defendants' costs of the
 (1903), application under Order xiv.
 LIMITED.

Furthermore, the case being one in which there was no jurisdiction under Order xiv., r. 1, it comes within Order xiv., r. 9 (b), and if so, the Court has no option but to make an order for the payment of those costs by the plaintiffs forthwith [They also cited *Gurney v. Small* (2); *Read v. Brown* (3); *Cooke v. Gill*. (4)]

[VAUGHAN WILLIAMS L.J. referred to *Begg v. Cooper*. (5)]

McCall, K.C., and *Forster McCall*, for the plaintiffs. The question is whether the affidavits sworn by the plaintiffs' manager do not establish a prima facie case for the plaintiffs under Order xiv., r. 1, to the extent of 132*l.* 10*s.* 4*d.* sufficiently to call upon the defendants for some affidavit in answer, but none such was made. It is not necessary under Order xiv., r. 1, that the person making the affidavit should swear to all the material facts necessary to constitute the cause of action upon which the plaintiff sues: *May v. Chidley*. (6)

In *Lagos v. Grunwaldt* (1) the affidavit appears to have been made by the plaintiff's solicitor merely upon information contained in the instructions given him by his client, which was clearly not sufficient. Order xiv., r. 9 (b), does not apply to a case like the present. The words "where the case is not within the Order" in that rule mean a case which by its nature is entirely outside the Order, as where the writ cannot be, or is not, specially indorsed.

Compton-Smith, for the defendants, in reply.

VAUGHAN WILLIAMS L.J. I think that this appeal must succeed. Mr. McCall with his usual frankness admitted that he could not

(1) [1910] 1 K. B. 41.

(2) [1891] 2 Q. B. 584.

(3) (1888) 22 Q. B. D. 128, 131.

(4) (1873) L. R. 8 C. P. 107.

(5) (1879) 40 L. T. 29.

(6) [1894] 1 Q. B. 451.

further argue the case, if the Court took the view that an affidavit, made for the purposes of Order xiv. by a person other than the plaintiff, which deposed merely to information and belief, or belief alone, did not satisfy the terms of Order xiv., r. 1, which requires an affidavit verifying the plaintiff's cause of action by the plaintiff, or "by any other person who can swear positively to the facts." He appeared to me to feel it difficult to deny that the affidavits made for the purposes of this case did rely upon information and belief, or belief alone, and, under those circumstances, the result at chambers ought to have been a refusal to give the plaintiffs liberty to sign judgment for any part of their claim. The admission made by Mr. McCall is really an admission of what is perfectly patent on the face of the affidavits, because they state facts which the deponent obviously could not speak to of his own knowledge, and therefore which he was not in a position to swear to positively. Order xiv. provides for a novel procedure, which is inconsistent with the usual common law practice, though there was an earlier enactment providing for a somewhat similar procedure in the case of bills of exchange. It is a new procedure dependent upon the presence of certain conditions, which are mentioned in the Order. The first condition is that there must be a specially indorsed writ. The second is that there must be an affidavit by the plaintiff himself, "or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his belief there is no defence to the action." The remedy given by the Order is a most stringent one, namely, a judgment without any trial. For my own part I cannot doubt that the framers of the Rules intended that the affidavit so required should be a condition precedent to the exercise of the power conferred by the Order to give judgment without a trial. It no doubt may often happen that an affidavit which fails to satisfy the requirements of the Order, because the deponent cannot swear positively to the facts therein stated, may produce upon the mind of the Master, or judge, who hears the case, a strong impression that, though the affidavit is not one which satisfies the terms of the Order, it, nevertheless, indicates a strong probability that the plaintiff has a good cause of action. The plaintiff, however, in

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C. A. order to obtain judgment without a trial, must have complied
 1911 with the terms of the Order. However strong may be the im-
 SYMON & Co. pression produced by the affidavit upon the mind of the Master,
 v. PALMER'S or judge, or Court, as the case may be, that the plaintiff may
 STORES probably have a good cause of action—I am not now speaking
 (1903), with regard to the particular case before us, but generally—if
 LIMITED. there be not a compliance with the terms of Order xiv., r. 1, in
 Vaughan respect of the affidavit to be made, there is no jurisdiction to give
 Williams L.J. effect to that impression by making an order for judgment.
 Order xiv. makes, no doubt, a very salutary provision for the pur-
 pose of preventing a defendant, who knows perfectly well that he
 owes the sum claimed, from postponing the time of payment, and
 putting the plaintiff to further expense in a litigation which
 ought never to have taken place; but on the other hand Order xiv.
 is an Order which can be, and often is, abused. A plaintiff's
 legal adviser may advise him that, though there is not much pro-
 spect of his getting judgment under Order xiv., and the defendant
 will probably get unconditional leave to defend, the defendant
 may have to swear an affidavit in answer to an application for
 judgment, in which he will have to disclose on oath what defence
 he is going to set up, and that may be a great assistance to the
 plaintiff at the trial, and therefore such an application should be
 made. I hope that this does not often occur, but I think that
 such a course is sometimes taken, and in my opinion that is a
 manifest abuse of the process of the Court. It was necessary
 therefore that the jurisdiction given by Order xiv. should be
 made conditional upon the making of an affidavit of the nature
 therein mentioned. As I have said, in my judgment, the affidavit
 in this case falls short of the requirements of Order xiv., r. 1, and
 therefore the order of the learned judge giving leave to sign
 judgment for 132*l.* 10*s.* 4*d.* ought never to have been made, and
 should be reversed, and the defendants should have uncon-
 ditional leave to defend as to the whole amount of the claim. I
 arrive at this conclusion, because I entirely agree with the
 statements of Cozens-Hardy M.R. and Farwell L.J. in
Lagos v. Grunwaldt (1), where they say that there is no juris-
 diction to make an order under Order xiv., r. 1, in such a case,

(1) [1910] 1 K. B. 41.

That case was in many respects very like the present, because the ground upon which it was held that there was no jurisdiction was that the affidavit there was not made by a person who could positively swear to the facts, but by the plaintiff's solicitor, whose knowledge was only obtained from the instructions received from his client. The result was held to be that there was no jurisdiction under Order xiv., r. 1. It follows from that, in the present case, not only that the order for judgment cannot stand, but that there was no jurisdiction upon that application to give any directions as to trial of the action, and the order giving those directions must be set aside.

The only other question with which I have to deal is that mentioned by the defendants' counsel at the close of his argument. He called our attention to Order xiv., r. 9 (*b*), which is as follows: "If the plaintiff makes an application under this Order where the case is not within the Order, or where the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, in any of such cases the application shall be dismissed with costs to be paid forthwith by the plaintiff." In my opinion this case falls within that rule. I think therefore that, not only should the judge's order for judgment be reversed, but that we must also order the plaintiffs to pay the costs of the application here and below, not merely in any event, but forthwith. It may be that it might have been more conducive to the interests of justice if the Order had given a discretion in this respect to the Master or judge in cases where he thinks that, though the affidavit filed by the plaintiff does not altogether satisfy the requirements of the Order, it nevertheless suggests the probability of the plaintiff's claim being well founded, but we have nothing to do but to give effect to the Order as it stands, and must be strictly governed by its terms. That is a rule applicable to all enactments and Orders, but it is pre-eminently applicable in the case of an Order which gives such a stringent remedy as judgment without a trial.

BUCKLEY L.J. Where the cause of action is such that under Order III., r. 6, the writ can be specially indorsed, and it is so

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C. A. indorsed, Order xiv., r. 1, enables the plaintiff to make an application for liberty to sign judgment, if he brings the case within
1911 the terms of that Order. Trial, as a rule, must precede judgment.
SYMON & CO. Order xiv. provides an extraordinary procedure in certain cases.
v. PALMER'S It is a procedure in which, instead of trial first and then judgment,
STORES (1903), there is judgment at once and never any trial. Such a
LIMITED. procedure must be strictly confined to the specific cases for which
Buckley L.J. it is provided, as set forth in the Order. Assuming the first condition which I have mentioned to be satisfied, and that the writ is specially indorsed, there is a second condition which is thus expressed: "The plaintiff may on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his belief there is no defence to the action," apply for liberty to enter final judgment. On these conditions only may the judge give the plaintiff leave to sign judgment in the action without any trial. The second condition is, as I have said, that an affidavit such as is specified in the Order shall be made. The question here is whether that condition has been satisfied. I need not go into particulars in this case. It is sufficient to say that the facts essential for the purpose of verifying the cause of action are not here stated on affidavit by a person who can swear positively to them, but by a person who can only vouch information and belief with respect to them; moreover his belief appears to be founded upon information which does not commend itself to me as being satisfactory. In my opinion, therefore, the conditions imposed by Order xiv., r. 1, are not satisfied. Plaintiffs have very largely endeavoured to abuse the provisions of Order xiv., r. 1. Take by way of illustration a case such as we recently had before us, a money-lender's action. Suppose that, the principal having been paid, the only dispute in the action is as to the amount of interest to be paid. The defence raised is that the bargain was harsh and unconscionable; the case is clearly not one for the application of Order xiv., but the plaintiff applies under Order xiv. with a view to getting an order that the case shall go into the short cause list so as to avoid the usual preliminary steps before a trial in the ordinary way. This is not legitimate. Again, an application

is often made under Order xiv., not with any expectation of success, but in order to induce the defendant to make an affidavit, and so get information on oath as to the nature of his defence. That is not legitimate. If there is no such affidavit as is required by Order xiv., r. 1, there is, I think, no jurisdiction under that Order to give judgment. The judge is bound to leave the action to proceed to trial in the usual way. He can only give judgment without a trial if the conditions mentioned in the rule are satisfied. The question of the sufficiency of the affidavit is, in my opinion, one which goes to jurisdiction. If that be so, then both under the provisions of Order xiv., r. 1, and also under Order xiv., r. 9 (b), the application ought in such a case as this to be dismissed with costs. It seems to me that the latter rule applies not only to a case where the writ is not specially indorsed, but equally to a case in which it is specially indorsed, but the plaintiff is not in a position to call Order xiv., r. 1, into operation, because the condition mentioned therein with regard to the affidavit necessary to found jurisdiction is not satisfied. For these reasons I think that the order giving leave to sign judgment for 132*l.* 10*s.* 4*d.* and the directions as to the mode of trial ought to be set aside, and the plaintiffs must under Order xiv., r. 9 (b), be ordered to pay forthwith the defendants' costs of the proceedings both here and below.

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KENNEDY L.J. I agree that this appeal must be allowed. For myself, I do not propose to lay down any general rule as to what may or may not be done in regard to other cases, but to confine myself to this case as it stands. I do not entirely concur with all that my brothers have said, but I agree with them that, upon the evidence before him, the learned judge ought not to have given leave to sign judgment for any part of the claim, but to have given unconditional leave to defend as to the whole. I agree, therefore, on the main question, but, with regard to other matters to which I will briefly refer, I have the misfortune to differ. Without expressing any opinion as to what exactly the requirements of Order xiv., r. 1, may be, I desire to observe that, according to the view which, as at present advised, I take, it is not correct to say that it is necessary for the purpose of satisfying

C. A. those requirements that there should be an affidavit deposing on
 1911 oath to all the matters which are material to the proof of the
 SYMON & Co. plaintiff's alleged cause of action. The terms of Order xiv., r. 1,
 v. do not require that, but that there shall be an affidavit "verifying
 PALMER'S the cause of action." It was stated as far back as 1893 in *May*
 STORES v. *Chidley* (1) that "the function of the affidavit is to verify the
 (1903), cause of action, and it does not matter that it does not state or
 LIMITED. verify all the particulars given in the statement of claim or
 Kennedy L.J. special indorsement." In that case the action was upon a cheque.
 The affidavit did not allege that notice of dishonour had been
 given to the drawer. It was held that the affidavit was, nevertheless,
 sufficient. Again, when I look at the form of affidavit to
 ground an application under Order xiv. which is set out in the
 books of practice, I find that, in substance, it merely states that
 the defendant is well and truly indebted to the plaintiff in the
 sum of £. and that the particulars of the said claim appear by
 the indorsement on the writ of summons in the action. Speaking
 for myself alone, I am not, as at present advised, prepared to say
 that the affidavit in this case is so far insufficient, when coupled
 with the indorsement on the writ, as to make the case one which
 is altogether outside the jurisdiction given by Order xiv., r. 1. It
 is extremely difficult to say exactly how, and to what extent, the
 principle laid down in *May v. Chidley* (1) is to be applied in
 practice, but one gets some guide from the form given for the
 affidavit which is in general terms. There is no doubt a difficulty
 in applying that form to all cases. Here it is sworn that the
 amounts claimed are in respect of cheques which have been
 improperly disposed of by a man in the plaintiffs' employ, and
 the cheques in relation to the items in question are produced,
 and then it is stated, no doubt, as a matter of information and
 belief only, that these cheques have passed through the account
 of the defendants at their bankers'. I am not prepared, as at
 present advised, to say that there is any such insufficiency
 in this affidavit as to involve a want of jurisdiction under
 Order xiv., r. 1. Of course the affidavit must be made by some
 person who is to some extent personally cognizant of the facts,

(1) [1894] 1 Q. B. 451.

and not by a person who has no real means of knowledge, as was the case in *Lagos v. Grunwaldt*. (1) The conditions requisite to give jurisdiction under Order xiv., r. 1, were in that case stated by Cozens-Hardy M.R. and Farwell L.J. That decision is binding upon me, even if I had the misfortune to differ from it, which I do not, but I doubt whether the present case comes within it.

There remains a further question, namely, the question whether this case comes within Order xiv., r. 9 (b). If I had by myself to decide that question, I should say that this case does not come within that rule. I do not think that the words "where the case is not within the Order" in that rule refer to insufficiency of the affidavit mentioned in Order xiv., r. 1. It is true, no doubt, that, in order to found the jurisdiction, there must be a proper affidavit. But the words of the rule are not "where there is no jurisdiction under the Order"; if they had been, the case would have been different. I think the expression "where the case is not within the Order" points to a case in which the indorsement on the writ shews that the case is not within the Order, or where the indorsement is in fact defective. The intention appears to me to be that, where the plaintiff has put the defendant to unnecessary expense, by making an application under the Order in a case which in its nature is entirely outside the Order, the Master or judge is to make an order that the plaintiff shall pay the costs forthwith. The rule couples that case with the case "where the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend." In either of those two cases the plaintiff is to be ordered to pay the costs forthwith, but the rule does not say that, where the plaintiff makes an application in any case in which there is no jurisdiction to make an order for judgment, he shall be ordered to pay the costs forthwith. The rule appears to me to point to cases where there has been an abuse of the procedure given by Order xiv., either because the claim is one of a nature which does not come within that Order, or because the plaintiff ought not to have made the statement in his affidavit

(1) [1910] 1 K. B. 41.

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Kennedy L.J.

C. A. that he verily believed that there was no defence to the
1911 action.

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Appeal allowed.

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Solicitors for plaintiffs: *Wansey, Stammers & Co.*

Solicitors for defendants: *Pontifex, Pitt & Johnson.*

E. L.

C. A.

[IN THE COURT OF APPEAL.]

1911

Oct. 16, 18 ;
Nov. 14, 15 ;
Dec. 21.

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESS-
MENT COMMITTEE AND WITHNELL OVERSEERS.

Poor Rate—Rateable Occupation—Owner in Possession of Land unlet—Presumption of Occupation by such Owner—Gathering Ground for Waterworks—Liability to Poor Rate—Part of Gathering Ground used as Plantations and Nurseries for young Trees—Rateable Value—Evidence of Price paid for Gathering Ground.

Where a municipal corporation has bought land, which forms a gathering ground for water that flows naturally therefrom to reservoirs belonging to the corporation, and keeps the land unlet and vacant in circumstances which shew an intention to maintain a constant control over the land for the purpose of ensuring a supply of water in a pure state to the reservoirs, the corporation is to be considered as being in occupation of the land so as to be rateable in respect of it.

The appellants (1), who were owners and occupiers of a system of reservoirs and waterworks, bought the greater part of land which formed a gathering ground for their waterworks, the water which flowed naturally from the gathering ground being received into their reservoirs and waterworks. A portion of the land so bought (1165 acres in extent) consisted partly of agricultural land with farmhouses and buildings on it, and more largely of moorland. In order to reduce the population and the cattle on the 1165 acres and so diminish the risk of pollution of the water flowing therefrom, the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon, and abolished certain rights of pasture and turbary which had previously been enjoyed thereon, and limited the user thereof to purposes of sporting and afforestation. They planted 297½ acres with trees for the purpose of improving the shooting, and utilized 8½ acres as a nursery for young trees, and enclosed the planted area in a ring fence. The remainder

(1) The terms "appellants" and of the parties respectively at quarter
"respondents" are used in this sessions.
report with reference to the position

of the said land, 859 acres, was moorland already enclosed by a fence when the appellants bought it. They had made a few grips in the planted area for the purpose of adapting it for plantations. The water from the grips flowed naturally like the rest of the water on the land to the waterworks of the appellants. The sporting rights over the land were let by the appellants to a lessee who was rated in respect of those rights. The gamekeeper of the lessee with the authority of the appellants warned trespassers off the land. Since the purchase of the land by the appellants trespassers had been more rigorously excluded from the land than before :—

Held, affirming the decision of a Divisional Court (1), that the appellants must be considered as being in occupation of the 859 acres of moorland, as well as of the land used for plantations and nursery, so as to be liable to be assessed to the poor rate in respect of the whole of the 1165 acres.

Held, further, that, as regards land so occupied by the appellants as gathering ground for water as to render inapplicable the ordinary test of annual value, namely, the actual rent which a tenant from year to year might reasonably be expected to give, evidence of the price paid by the appellants for the purchase of the land was admissible as an element to be taken into consideration, though not necessarily conclusive, for the purpose of arriving at its rateable value.

APPEAL and cross-appeal from the judgment of a Divisional Court (Lord Alverstone C.J., Hamilton J., and Avory J.) upon a case stated by the Court of quarter sessions for the county of Lancaster. (1)

The appellants, the Liverpool Corporation, were owners and occupiers of a system of reservoirs and waterworks known as the Rivington Waterworks.

They appealed to quarter sessions against a poor rate for the township of Withnell made on or about April 27, 1909. The only question on the appeal to quarter sessions material to this report was as to an assessment made upon the appellants in respect of land forming part of the gathering ground of the waterworks of the appellants.

The appellants in the first instance owned only the land occupied by their reservoirs and works, and by virtue of such ownership they received into their reservoirs and works the water which flowed naturally from the gathering ground, including that part of it in question in the appeal (1165 acres in area and hereinafter called "the said land").

(1) [1911] 1 K. B. 1057.

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ASSESSMENT
COMMITTEE
AND
WITHNELL
OVERSEERS.

C. A. They feared that so long as the gathering ground was owned
 1911 by persons other than themselves they might not be able to
 LIVERPOOL prevent pollution of the water flowing from it to their water-
 CORPORATION works. They therefore bought the greater part of the gathering
 v. ground. The said land was bought by agreement at a price
 CHORLEY amounting to 26*l.* 10*s.* per acre. Other parts were subsequently
 ASSESSMENT bought by agreement or under compulsory powers at various
 COMMITTEE prices, e.g., in one case 76*l.*, in another 409*l.* per acre, the
 AND average cost of the whole area of about 10,000 acres, including
 WITHELL the said land, being 45*l.* per acre.
 OVERSEERS.

The general policy of the appellants with regard to the gathering ground was summed up in one of their reports in the following terms: "Any measures for preventing the pollution of the stream and reservoir must necessarily have for their object a considerable reduction in the resident population; and this can most advantageously be brought about by limiting the uses of the land to such purposes as sheep farming, forestry and sporting."

The said land when bought by the appellants consisted partly of agricultural land with farmhouses and buildings on it and more largely of moorland. In order to reduce the population and the cattle on the said land and so diminish the risk of pollution of the water flowing therefrom, the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon, and abolished certain rights of pasture and turbary, which had previously been enjoyed thereon, and limited the user thereof to purposes of sporting and afforestation in manner hereinafter appearing. As to 306 acres of the said land they planted 297½ acres of the said land with trees for the purpose of improving the shooting, and utilized 8½ acres as a nursery for young trees and enclosed the planted area in a ring fence. The remainder of the said land, 859 acres, was moorland already enclosed by a fence when the appellants bought it. They made a few grips in the planted area for the purpose of adapting it for plantations. The water from the grips flowed naturally like the rest of the water on the said land to the waterworks of the appellants.

Inside one of the plantations was a spring of water. In

order to prevent the water therefrom from accumulating in the plantation, it was conveyed by the appellants in a pipe through a portion of the plantation and along the side of a road to a trough which supplied water to a village outside any lands of the appellants and so preserved the right of the inhabitants of the village to a supply from the spring. The trough was kept full by means of an automatic arrangement, and such water as was not used to fill the trough continued to flow to the waterworks of the appellants as it had done since the construction thereof.

The sporting rights over the said land and also certain other lands of the appellants were let by them under a lease dated March 16, 1906, for four years from December 11, 1905. By the lease the lessee for himself and his assigns covenanted with the appellants, their successors and assigns, (inter alia) that he the lessee "will at all times during the said term permit the corporation either by themselves or their agents surveyors and workmen at any time to enter upon the said farms lands and moorlands for the purpose of thinning laying and cutting dykes (such dykes to be cut to the satisfaction of the lessee) carting cutting down and removing timber or poles collecting acorns cultivating or laying out the lands as new coverts nurseries or plantations constructing maintaining and examining rain gauges examining watercourses and for any other similar purpose whatsoever And will not do or cause or suffer to be done upon the farms and lands over which the right of shooting hereby demised is to be exercised any act whereby the waters in the reservoirs goits or works of the corporation or the streams discharging into the same shall or may be polluted discoloured or otherwise injuriously affected or whereby the works or property of the corporation may be injured And will from time to time and at all times during the said term permit the corporation to execute upon the said farms and lands any works for more effectually collecting carrying and preserving the purity of the waters flowing to upon or from the same directly or derivatively into the said reservoirs goits or works of the corporation the corporation making fair and proper compensation to the lessee for all loss damage or injury (if any) which he may sustain or incur by reason or in consequence of the execution of such works."

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The lessee was rated in respect of the sporting rights.

The lessee's gamekeeper warned trespassers off the said land.

In so doing he acted with the authority of the appellants. Since the purchase of the said land by the appellants trespassers had been more rigorously excluded from the said land than before.

There was no evidence that pollution by trespassers was a material source of danger, and save as aforesaid there was no evidence that in warning off trespassers the lessee's gamekeeper acted as the agent of the appellants and for the purpose of preventing pollution. Save as aforesaid there was no evidence that the appellants had performed any outward acts of occupation on the said land.

It was admitted by the appellants that they were in rateable occupation of the 306 acres used by them for plantations and nurseries, but they contended that the plantations and nurseries were not made in order to increase and did not increase the profits from the waterworks and were rateable only at their value as plantations and nurseries under s. 4 of the Rating Act, 1874, and not on the basis of their having an enhanced value as a gathering ground for their water undertaking.

With regard to the remainder of the said land (859 acres consisting of moorland) the appellants contended: (1.) That the said land was unoccupied except so far as it was occupied by the sporting lessee, who was duly rated by the respondents in respect of such occupation. (2.) That prior to the acquisition of the said land by the appellants the water flowed therefrom naturally into the appellants' reservoirs, which were and are duly rated by the respondents, and that except so far as the ownership of the said land rendered it easier for the appellants to enforce the law for the prevention of pollution of the water and so maintain the value of the waterworks their position was in no way altered by the acquisition of the said land.

The respondents contended: (1.) That the appellants did not merely exercise the ordinary rights of an absentee owner in keeping trespassers off land of which he is not in rateable occupation; that the principal use and purpose of the land in question in the hands of the appellants was to supply water in a pure state to their reservoirs and that the appellants used and

controlled the said land for that purpose, and that if the appellants had not used and controlled the said land in the way they did, namely, by taking measures (or procuring that measures should be taken) to keep off trespassers and by leaving water to flow over the said land as far as possible in its natural condition and by the forces of nature, that purpose could not have been fulfilled; that there was occupation of the said land by the appellants similar to the occupation of a fruit tree when there is no fruit on it or of a hayfield while the grass is growing, and that the appellants secured the best value from the said land by the use they made of it. (2.) That the appellants were in rateable occupation of the said land by virtue of the springs, pipes, and grips in and upon the said land which conveyed water to the appellants' reservoir as described above, and that the laying of pipes and the erection or continuance of the fences mentioned above constituted evidence of rateable occupation. (3.) That the appellants' Rivington water undertaking should be treated as a whole, and that the appellants could not be held to be in occupation of some parts only of the property held and used by them for the purposes of the undertaking and to be not in occupation of other parts. (4.) With regard to the value of the said land the respondents contended (a) that the average price paid by the appellants for the whole of the gathering ground owned by them in connection with their Rivington water undertaking was the best evidence or at all events some evidence of the value of such ground; (b) that 3½ per cent. on such average price was a fair and proper percentage to be taken to arrive at the rateable value; (c) that the main use in the hands of the appellants of the ground which the appellants had fenced in and planted was not for the purpose of plantations but for the purpose of supplying water, and that such ground should be assessed at its value as a water-bearing area with springs on it and not as land used only as a plantation or wood.

The Court of quarter sessions held:

1. That the appellants were not in rateable occupation of the said land with the exception of the parts used by them for plantations and nurseries.
2. That the plantations and nurseries should be assessed

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3. That the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for plantations and nurseries.

The questions for the opinion of the Court were whether on the evidence before them the three above-mentioned decisions of the Court of quarter sessions were respectively right in law.

The judgments given in the Divisional Court appear in the report of the case in the Court below. (1)

The order of the Divisional Court as finally drawn up answered the questions raised by the special case in substance as follows, namely, that the appellants were in rateable occupation of the whole of the 1165 acres of land mentioned in the case, and, that being the opinion of the Court, the second and third questions put in the case were immaterial, if and so far as the said plantations and nurseries were part of the gathering ground; but, if and so far as the said plantations and nurseries were not so part, the Court was of opinion that the plantations and nurseries not so part as aforesaid should be assessed under s. 4 of the Rating Act, 1874, at 2s. per acre and 15s. per acre respectively, and that the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for the plantations and nurseries.

The corporation appealed against the decision of the Divisional Court that they were in rateable occupation of the land other

(1) [1911] 1 K. B. 1065. There seems to have been some misunderstanding with regard to the 306 acres used for plantations and nurseries in the Court below when the judgments were delivered, which was set right by the order of the Court as finally drawn up. The judgments appear to have been given on the assumption that the 306 acres were to be treated as separately rated merely as plantations and nurseries under the Rating Act, 1874, the only question

as to them being whether on that footing their value ought to be considered as enhanced by their capacity for acting as a gathering ground for water. The result of the case, however, being that the decision of the sessions as to the 859 acres of moorland was wrong, and that the corporation must be treated as occupying the whole of the 1165 acres as gathering ground, no question of rating the 306 acres separately merely as plantations and nurseries ultimately arose.

than that used for plantations and nurseries, and the assessment committee appealed against the decision of the Divisional Court as regards the land used for plantations and nurseries.

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Oct. 16, 18; Nov. 14, 15. *Balfour Browne, K.C.*, and *Macmorran, K.C.* (*Oulton* with them), for the appellants. The corporation are not in occupation of, and therefore are not liable to be rated for the land other than that used for the plantations and nurseries. It is admitted that the corporation occupy the land used for the plantations and nurseries, and the question which is raised by the cross-appeal is on what basis they are to be assessed in respect of that land. An owner in possession of land is not necessarily in occupation of it. The question whether he actually occupies it is one of fact. Assuming that *prima facie* he may be presumed to be in occupation, where no one else occupies, that presumption may be rebutted by the facts of the particular case. The quarter sessions have considered the question of fact in the present case, and have found that the corporation were not in occupation of the land other than that used for the plantations and nurseries, and, if there was any evidence to support that finding, the Court will not disturb it. The proposition enunciated by Lord Atkinson in *Winstanley v. North Manchester Overseers* (1) that "owners in possession are *prima facie* occupiers, unless it be shewn that the occupation is in some one else," cannot be taken to mean that, unless some one else occupies, the owner in possession must necessarily as a matter of law be taken to occupy. It must be read in relation to the facts of that case, which shewed that the rector actually exercised rights over and derived profits from the use of the churchyard, which constituted occupation of it. Read in its widest sense the proposition would be inconsistent with well-settled law. It is clear law that the owner in possession of a vacant dwelling-house, which he does not use for any purpose, is not rateable in respect of it. The cases which will be relied upon for the assessment committee are all distinguishable, because in those cases there were acts done which were evidence of an intention to occupy by the party rated; e.g., in *Rex v.*

(1) [1910] A. C. 7, at p. 14.

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Melladew (1), though the various floors of the warehouse were for the time being empty, there were facts which led to the conclusion that the warehouseman continued to intend to occupy, and to use them, whenever and as often as occasion should arise for his so doing. So in the case of a dwelling-house which is not let, if the owner keeps furniture in it, he is rateable, although he does not live in it. Here the very object with which the corporation bought the land, which in their hands merely served the purpose of a natural gathering ground for water, was that it should remain unoccupied by anybody, so that the water should not be contaminated in any way. They did not use, or intend to use, that land in any way, but, on the contrary, intended that it should remain in its natural state unused, except so far as the shooting over it was concerned, which they let, and which constitutes a separate rateable hereditament, in respect of which the lessee is rated under the Rating Act, 1874. Acts done by an owner in possession, merely for the purpose of keeping off trespassers, or preventing injury to his property, such as, for instance, keeping a fence round the land, or warning off trespassers, cannot be treated as constituting occupation of the land for the purpose of rateability. So far as any benefit derived from the keeping of the water pure is concerned, that is taken into consideration in assessing the value of the reservoir to which the water goes. There would therefore be a double rating, if the corporation were rated for the gathering ground by reason of the benefit derived from keeping the water pure. It would be a strange thing if it were held that, though a house, which is an artificial construction, may for the purpose of rating be unoccupied, land in its natural state unused for any purpose, in order that water may be allowed to gather upon and flow from it in the ordinary course of nature, must necessarily as a matter of law be presumed to be occupied by its owner. It is not enough to say that the land is under the control of the corporation. A vacant house is similarly under the control of its owner. There was evidence here on which the sessions were entitled to find, as they did, that the gathering ground was not occupied by the corporation.

(1) [1907] 1 K. B. 192.

[KENNEDY L.J. The question whether certain facts did or did not exist was, no doubt, for the sessions, but the inference from those facts would appear to be a question of law.]

It is submitted that really in this case there was no evidence of occupation by the corporation. It is clear that liability to poor rate depends on occupation: see *Governors of Bristol Poor v. Wait* (1); *Milward v. Caffin*. (2) Mere ownership of land with possession, which is really all that there was here, does not constitute occupation. In *Reg. v. St. Pancras Assessment Committee* (3) Lush J. said in giving judgment, "Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier." Assuming that the corporation could be considered as occupying the gathering ground by their lessee of the shooting, an occupier of land is only liable to be rated to the extent of the value of the land in the state in which he chooses to keep it, and used as he chooses to use it. An owner is not bound to put his land to any particular use for the benefit of other ratepayers. If land would be valuable for building purposes, but the owner chooses to occupy it as a field, he is only rateable in respect of it as a field: *Rex v. St. Luke's Hospital*. (4) Here the only matter in respect of which the land could be said to be used was the shooting over it, and in respect of that the lessee is rated separately.

Danckwerts, K.C., and *Ryde, K.C.* (*Gordon Hewart* with them), for the respondents. The land occupied by the plantations and nurseries also serves as gathering ground for water, so that, if the assessment committee be right in contending that the corporation must be considered as occupying and using the gathering ground, so as to be rateable in respect of it as such, then no question as to the proper mode of estimating the value of the plantations and nurseries, taken separately merely as such, under s. 4 of the Rating Act, 1874, will arise, because

(1) (1836) 5 Ad. & E. 1.

(2) (1779) 2 Wm. Bl. 1330.

(3) (1877) 2 Q. B. D. 581, at p. 588.

(4) (1760) 2 Burr. 1053.

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the land so used will be rateable along with the other gathering ground. The provisions of s. 4 of the Rating Act, 1874, only contemplate a case where "the land is used only for a plantation or wood." Moreover, it being admitted that the corporation occupies the land used for plantations and nurseries, the authorities shew that, this being so, it must be valued with reference to its inherent capacity for being used as a gathering ground for water: see *Eyton v. Mold Overseers* (1); *Reg. v. Battle Union* (2); *Davies v. Seisdon Union*. (3)

With regard to the land other than that used for plantations and nurseries, the case of *Winstanley v. North Manchester Overseers* (4) establishes the principle that an owner in possession must, at any rate *prima facie*, be presumed to be in occupation. The reading of Lord Atkinson's words suggested by the counsel for the corporation is not in accordance with their plain and natural meaning, but, admitting, for the purposes of argument, that they leave open the possibility of the *prima facie* presumption being rebutted, even although no one other than the owner is in occupation, the facts in the present case, so far from rebutting the presumption, have the contrary effect. The present case is in some respects a stronger case for giving effect to the presumption than was the case of *Winstanley v. North Manchester Overseers* (4), for there is no public right in respect of this land like the right of burial which existed in that case with regard to the churchyard. Here the corporation deal with and control the land for the purpose of ensuring a supply of pure water to their reservoirs. The indicia of occupation vary according to the nature of the particular subject-matter in regard to which the question arises, as was pointed out by Collins M.R. in *Rex v. Melladew*. (5) The corporation in this case did such acts as, having regard to the nature of the subject-matter, were quite sufficient indicia of occupation thereof. The law with regard to vacant dwelling-houses was regarded as an anomaly by Blackburn J. in *Harter v. Salford Overseers*. (6) The case of such a house ought therefore to be looked upon as an exception

(1) (1880) 6 Q. B. D. 13.

(2) (1866) L. R. 2 Q. B. 8.

(3) [1908] A. C. 315.

(4) [1910] A. C. 7.

(5) [1907] 1 K. B. 192, at p. 200.

(6) (1865) 6 B. & S. 591.

from the general principle that an owner in possession ought to be presumed to be in occupation, if no one else occupies. But the present case entirely differs from that of a vacant dwelling-house. Occupation is largely a question of intention. In the case where a vacant dwelling-house is exempted from rateability, the owner in possession may be presumed to intend not to occupy the house himself, but that some one else shall occupy it, when he finds a tenant. In the present case the express intention of the corporation is that no one else shall ever occupy the land, apart from the shooting rights, and that they shall retain and exercise the control over it so as to prevent any contamination of the water. The principle upon which the value must be estimated for the purpose of rating in the case of such an undertaking as the corporation's water undertaking is that the undertaking must be regarded as a whole; the profits of the whole undertaking must be taken; and, by the process of elimination of the proportions of them attributable to other elements, the value of that portion of the hereditaments which is situate in the particular parish must be estimated. Clearly a portion of the profits derived from the supply of pure water in Liverpool must be attributed to such of the corporation's hereditaments connected with the water supply as are situated in the parish in question, and therefore to the gathering ground; and, in estimating the value of the hereditaments in other parishes, the value in that parish must be eliminated. [There were also cited on this point *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (1); *Rex v. Corporation of London* (2); *Borwick v. Southwark Corporation* (3); *Smith v. New Forest Union Assessment Committee* (4); *Staley v. Castleton Overseers* (5); *Staunton v. Powell* (6); *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Doncaster Union*. (7)]

On the question with regard to the admissibility of the evidence as to the average price paid by the corporation

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(1) [1895] A. C. 117.

(2) (1790) 4 T. R. 21.

(3) [1909] 1 K. B. 78.

(4) (1889) *Ryde's Rating Appeals*,
1886—1890, 311; (1889) 61 L. T.

870.

(5) (1864) 5 B. & S. 505.

(6) (1867) 15 W. R. 362.

(7) (1893) *Ryde's Rating Appeals*,
1891—1893, 318; (1894) 71 L. T. 585.

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for the gathering grounds, it is contended that it was admissible and ought to have been taken into consideration by the sessions. It is not suggested that it was necessarily to be accepted by the sessions as a conclusive test of annual value. Its weight might depend on other circumstances; it is merely suggested that it was admissible as forming an element for consideration in arriving at the value of the subject-matter. The question of value is one of fact, and the judgment of Lord Halsbury in *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (1) shews that there is no rigid rule as to the mode of arriving at the value of the hereditament in such a case as this, but that any circumstances connected with the occupation which may throw light on the subject should be considered. The Liverpool Corporation must themselves be taken into consideration as hypothetical tenants of this land. The fact that the owners of a hereditament, requiring it for the purpose for which they use it, thought it worth their while to give what they gave for it is material for the purpose of considering what the annual value of its occupation is to them. [There were also cited on this point *Cartwright v. Sculcoates Union* (2); *Liverpool Corporation v. Llanfyllin Assessment Committee* (3); *Talargoch Mining Co. v. St. Asaph*. (4)]

Balfour Browne, K.C., for the Liverpool Corporation, in reply. The land occupied by the plantations and nurseries was treated all through, at the sessions and in the argument and judgment in the Court below as rateable separately from the rest of the land which was merely gathering ground. The lessee of the shooting upon the whole of the 1165 acres in question was separately assessed. The only question with regard to the land occupied by the corporation as plantations and nurseries was as to the basis on which the annual value of that land as plantations and nurseries is to be estimated. It is submitted that that land must be treated as rated under the Rating Act of 1874, s. 4 (a), and that the price which the corporation gave cannot fairly be taken as any test of the rateable value of that

(1) [1901] A. C. 175.

(3) [1899] 2 Q. B. 14.

(2) [1899] 1 Q. B. 667; [1900] A. C. 150.

(4) (1868) L. R. 3 Q. B. 478.

land to them. On the general question of the rateability of the corporation in respect of the gathering ground, if the argument for the assessment committee is right, there can be no such thing as unoccupied land for the purposes of rating, though it is not disputed that a dwelling-house may be unoccupied. It is clear on the authorities that this contention goes too far. It is suggested that the corporation derives a benefit, and therefore has a beneficial occupation of the land, because by preventing others from occupying it the water is kept pure. This is a fallacy, because the water is kept pure, not really by reason of the corporation occupying the land, but by reason of the corporation as owners preventing any occupation of the land.

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Dec. 21. VAUGHAN WILLIAMS L.J. It is stated in the special case that it was admitted that the corporation were in occupation of the 306 acres of plantations and nursery, but they claimed that they were not in occupation of the 859 acres of moorland, and so were not rateable in respect of that part. I agree with the Divisional Court and with the other members of this Court that the corporation are in rateable occupation of the 859 acres. I assume, in accordance with the observations of Lord Atkinson in *Winstanley v. North Manchester Overseers* (1), that, although the ownership of a hereditament does not necessarily imply occupation for the purpose of rating, and although a person or company may be an occupier within the meaning of the statute of Elizabeth who has no proprietary interest in the soil, as was decided in *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (2), yet owners in possession are *prima facie* occupiers—"in possession" there does not mean physical possession, it means who are in possession by title—unless it be shewn that the occupation is in some one else: see per Buller J. in *Rex v. Mayor of London*. (3)

In the present case there is no contention that any other person in fact occupies. *Prima facie*, therefore, the corporation

(1) [1910] A. C. 7.

(2) [1895] A. C. 117, at p. 121.

(3) 4 T. R. 21.

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are in occupation, and the question is, has this *prima facie* inference been displaced, and if so, how?

I think, for the reasons given in the Divisional Court and in the judgments of my brethren, which I have had the opportunity of reading, the *prima facie* conclusion has not been displaced. The principal part of the argument against this conclusion was based upon the proposition established by, amongst other cases, the case of *Reg. v. St. Pancras Assessment Committee* (1), that a vacant house—and I think it covers vacant land—is not occupied for rating purposes. We were invited to draw certain inferences of law in this case from that decision, and the other decisions upon the same lines, and the well-established practice that a vacant house, and, as I say, vacant land, is not the subject of rating. We were asked to say in this case that, inasmuch as the moorland, at all events, was purchased by the corporation, not for the purpose of occupation, but for the express purpose that it should not be occupied, we ought to apply the rule established in respect of vacant houses to this vacant land. If I had to give a reason why we do not draw the inference which we are invited to draw, I should say that it appears to me, upon looking at the cases, that the only way to accept the principle which is applied to vacant houses as part of the law of rating is that, for convenience or some other reason, it has been determined by what I will call judge-made law that houses shall be excepted from the general rule; but I think that, when one reads the recent decisions, especially the decisions in the House of Lords which I have just quoted, it is impossible really to avoid the conclusion that, however firmly established this law as to the non-rateability of owners of vacant houses may be, it is a special exception, and one must not draw any logical conclusions from it; it is a decision of practical convenience, which negatives, to my mind, the right or duty to draw practical conclusions therefrom. I agree, if one had to draw such conclusions in this case, that there is a great deal to shew that this was vacant land, just as much as the houses were vacant in the various cases in which it has been decided that vacant houses should not be rated.

(1) 2 Q. B. D. 581.

I have now to deal with the question of the proper mode of assessment in respect of the 306 acres of plantations and nurseries.

The special case tells us that the Court of quarter sessions decided that these should be assessed under s. 4 of the Rating Act of 1874 at 2s. and 15s. per acre. But this decision of the quarter sessions was on the assumption that the corporation were not in rateable occupation "of the said land," that is, the whole 1165 acres, "with the exception of the parts used by them for plantations and nurseries." Now that this assumption has been negatived both by us and by the Divisional Court, it follows that the question of fact to be decided by the Court of quarter sessions, i.e., the question of value and mode of assessment, is entirely different, but in my judgment the assessment and value ought still to be decided by the Court of quarter sessions and should be sent back to them to decide.

It may be that the occupation of the plantations and nurseries may be such that they could easily be let from year to year. No evidence is before us on this point, and, on the finding by quarter sessions that the 859 acres were not occupied for rating purposes by the corporation, the above question of fact did not arise. It is argued that the question of fact ought not to be sent back to quarter sessions because the order of the Divisional Court, as amended and drawn up after the hearing, finds that the corporation were in rateable occupation of the whole of the 1165 acres of land in the said case mentioned, and, that being the opinion of the Court, the second and third questions put in paragraph 14 of the case stated "are immaterial questions, if and so far as the said plantations and nurseries are part of the gathering ground." That is a quotation verbatim from the order. But the order goes on to say, and this again is a verbatim quotation, "but, if and so far as the said plantations and nurseries are not so part, the Court is of opinion that the plantations and nurseries not so part as aforesaid should be assessed under s. 4 of the Rating Act, 1874, at 2s. per acre and 15s. per acre respectively, and that the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for the plantations and nurseries." This part of the

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order plainly contemplates that quarter sessions will consider these questions, and so do the judgments of the Lord Chief Justice and Hamilton J. at pp. 1070 and 1075.

I have only to add that, in my opinion, the application of the measure of the interest upon the price paid does not generally apply to property which in its condition can be let from year to year. It is for the quarter sessions to decide on evidence whether that is the case with these plantations and nurseries. The application of the measure of interest upon the price is a question of fact to be determined by quarter sessions. Nobody doubts but that the price is an element which may or must be taken into consideration, but the extent to which it must be taken into consideration must be determined by the quarter sessions: see the case of *Great Central Ry. Co. v. Banbury Union*. (1)

I think the result of this judgment is that first we ought to add that direction in terms to our judgment when we send back the case to the Court of quarter sessions, and I think also that, inasmuch as the main question fought before us was the question whether there was rateable occupation, and that argument largely turned upon the question as applied to the moorland, and as the corporation have lost as to that which was the main feature of the argument, this appeal ought to be in terms dismissed with costs, of course subject to the directions I have mentioned.

BUCKLEY L.J. read the following judgment:—The order of the Divisional Court remits the case to the Court of quarter sessions with an expression of opinion that the corporation are in rateable occupation of the whole of the 1165 acres. In my opinion this is right. The only question here is whether the corporation are in rateable occupation of the 859 acres, part of the 1165 acres. In my opinion they are. The best summary that I know of the law as to what constitutes occupation is to be found in the words of Lush J. in 1877 in *Reg. v. St. Pancras Assessment Committee* (2): "Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a

(1) [1909] A. C. 78.

(2) 2 Q. B. D. 581, at p. 588.

vacant house is in possession, and may maintain trespass against any one who invades it, but, as long as he leaves it vacant, he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year. On the other hand, a person who, without having any title, takes actual possession of a house or piece of land, whether by leave of the owner or against his will, is the occupier of it." The owner need not be, and often is not, the occupier. The occupier need not necessarily have any estate in the land. There may be occupation without the existence of the relation of tenant towards the owner: *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (1) But an owner in possession is prima facie occupier unless the occupation is shewn to be in some one else: per Buller J. in *Rex v. Mayor of London* (2); per Herschell L.C., *Manchester, Sheffield and Lincolnshire Ry. Co. v. Doncaster Union Assessment Committee* (3); *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (4) The intention of the alleged occupier is a governing factor in determining whether rateable occupancy is established (per Blackburn J. in *Allan v. Liverpool* (5); *Rex v. Melladew*. (6)) *Rex v. Mayor of London* (7) is not an authority for the proposition that a person who can bring trespass is necessarily in occupation. But it is an authority for the proposition that a person who can bring trespass and who is receiving profit or benefit from the property is in occupation if no one else is. The fact that the alleged occupier is not physically upon the property either in person or by works done or chattels placed upon the property is not necessarily the test. There are many cases in which the occupier has no need to go, and does not go, upon the land. Take, for instance, the case of growing underwood which is cut only after the lapse of many years: *Rex v. Inhabitants of Mirfield* (8); or the case of growing crops or fruit trees, where

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(1) [1895] A. C. 117.

(2) 4 T. R. 21, at p. 27.

(3) 71 L. T. 585, at p. 587.

(4) [1895] A. C. 117, at p. 121.

(5) (1874) L. R. 9 Q. B. 180, at p. 192.

(6) [1907] 1 K. B. 192.

(7) 4 T. R. 21.

(8) (1808) 10 East, 219.

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for many months in the year the occupier has no occasion to go, or would do harm if he did go, upon the land. Where the alleged occupier is a recent purchaser, one test is whether, being the owner and having put no other person into possession, he has such use of the land as it is reasonable to infer that he intended to obtain when he bought it, that use being one which constitutes a benefit to him, not in the sense that he makes a profit by it, but in the sense that the occupation is of value to him: *London County Council v. Erith*. (1) Are the corporation using the land for the purpose of their business or adventure and deriving benefit from it? If so, then their case is similar to that of the warehouseman in *Rex v. Melladew* (2) or the owner of the empty building kept ready for occupation in case of emergency in *Borwick v. Southwark Corporation*. (3) An owner who retains property in hand, and gets benefit from it, is rateable to the extent of that benefit (per Blackburn J. in *Harter v. Salford Overseers*. (4)) The amount of the rate is controlled, no doubt, by the use to which the owner puts the land: *Rex v. St. Luke's Hospital*. (5) The property is rateable as it is, not as it might be made, but this is a consideration which goes not to rateability but to quantum of rate.

These being the principles which in my judgment govern the matter, the facts are these. The corporation before they bought this land enjoyed the natural flow of the water from the ground, but they enjoyed it subject to two contingencies, each of which would be to their detriment, namely, first, that a resident population might come upon the land and thus render impure the water, which previously was pure, and, secondly, that such a resident population might consume the water and diminish the supply. They bought the land for the purpose of excluding those dangers. It was worth their while to pay a large sum of money for the land to ensure the absence of a population which might (a) contaminate or (b) consume. They have put no other person in occupation. They are enjoying the benefit for which they bought the land. Further, by the demise

(1) [1893] A. C. 562.

(3) [1909] 1 K. B. 78.

(2) [1907] 1 K. B. 192.

(4) 6 B. & S. 591, 597.

(5) 2 Burr. 1053, at p. 1064.

of the sporting rights they are deriving profit from the land being left free of population. Their purpose, which is to ensure absence of population, is thus in several ways of value to them. They are persons capable of maintaining trespass: they are enjoying a benefit from the land. In my opinion the conjoint effect of those two facts is to constitute rateable occupation.

There is a second question in the case, namely, whether the price paid by the corporation for the gathering ground is any evidence of rateable value. In my opinion it is. In looking for the hypothetical tenant the corporation is to be regarded as within the class of persons to be considered. If they did not own this land, they might wish to rent it for the purposes for which they bought it. What would it be worth their while to pay as rent? It was worth their while to pay a sum whose annual value, had it been invested, would have been so much. They have forgone that annual income as the price of having the land. Had they rented instead of buying, that annual sum is some evidence of the amount which it was worth their while annually to pay. In the absence of better evidence, the price paid is, I think, evidence to be regarded. As I read the order of the Divisional Court it has answered the third question in the special case only as regards the plantations and nurseries if and so far as they are not part of the gathering ground. The order contemplates two events. In the first, which is the material one, it states the third question to be immaterial. In the second it answers the question. It is impossible that the answer at the end of the order can be intended to refer to the case in which the question is said to be immaterial. The whole of the 1165 acres being, in my judgment, part of the gathering ground, the hypothetical answer which the Divisional Court made to the question does not arise upon the appeal, but, as the question as a general question may arise before the quarter sessions, I have expressed my opinion upon it as above stated. In my judgment the appeal fails and should be dismissed with costs.

KENNEDY L.J. read the following judgment:—Upon the principal matter of contention between the parties to this appeal, namely, whether the Liverpool Corporation, the owners of the

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C. A. 1165 acres, are liable to be rated as occupiers in respect of any part of this area, except the 306 acres used by them for plantations and nurseries, as to which the corporation admit liability to be rated under s. 4 of the Rating Act, 1874, I have, upon the whole, come to the conclusion that the assessment committee, the respondents in this Court, are entitled to hold the judgment which they obtained in the Divisional Court. The question of their rateability, except in regard to the 306 acres, is, I think, upon the rather peculiar facts of the present case not an easy one to answer. I find a difficulty in satisfactorily reconciling all the judicial authorities, many of which were cited to us, in regard to the liability of owners of land who do not, as the word "occupation" is commonly understood, occupy their possession themselves, but who do, at the same time, prevent other persons from occupying it or entering upon it. We have the opinions of Lord Mansfield in *Rex v. St. Luke's Hospital* (1) and of Lush J. in *Reg. v. St. Pancras Assessment Committee* (2); the judgment of the Divisional Court in *Overseers of Bootle v. Liverpool Warehousing Co.* (3); and the recognition by Crompton J. and Blackburn J. in *Harter v. Salford Overseers* (4) of the practice, although, by a remark made by him in the course of the argument, Blackburn J. shewed that he regarded it as anomalous, that the owners are not rated in respect of empty houses. On the other hand, we have the decision in favour of the rateability of owners in *Rex v. Melladew* (5) and in *Borwick v. Southwark Corporation* (6), and expressions of opinion by Buller J. in *Rex v. Corporation of London* (7), by Lord Herschell in *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (8), and by Lord Atkinson in *Winstanley v. North Manchester Overseers* (9) to the effect that owners in possession are prima facie occupiers unless it can be shewn that the occupation is in some one else. I may say in passing that I think that the expressions of judicial opinion in each of the last cited

(1) 2 Burr. 1053.

(2) 2 Q. B. D. 581, at p. 588.

(3) (1901) 85 L. T. 45.

(4) 6 B. & S. 591.

(5) [1907] 1 K. B. 192.

(6) [1909] 1 K. B. 78.

(7) 4 T. R. 21.

(8) [1895] A. C. 117, at p. 121.

(9) [1910] A. C. 7, at p. 14.

cases, as Lord Alverstone C.J., in regard to the language used by Lord Atkinson, has stated in the course of his judgment in the present case, ought not to be regarded as pronouncements of universal application, but strictly in connection with the special facts of the case in which judgment was being given. In all of these cases, if I understand the facts, the owners derived a valuable benefit from the property and premises in question. I should have been glad if from the consideration of the decisions, to some of which I have referred, I could have discovered some clear principle, or definite test, which I could apply in deciding whether an owner who, as in the present case, possesses actually untenanted land, and does not permit any one else to occupy it, but does not, in the ordinary sense in which I have used the word, occupy it himself, ought or ought not to be held liable to be rated as an occupier in respect of it. I must confess myself unable to discover such a principle or test. I must content myself with the conclusion stated by Lord Mersey (then Bigham J.) in his judgment in *Borwick v. Southwark Corporation*.⁽¹⁾ He says: "Whether a man 'occupies' or not is in each case a question of intention to be ascertained with reference to the particular circumstances." Lord Mersey went on to say in the same sentence, "and if there are facts which one way or the other can reasonably support the conclusion at which the justices arrive I do not think this Court should interfere with that conclusion. It is a finding of fact." I venture to think that this latter statement gives rather too much weight to the decision of the justices, valuable as that decision always is, and especially valuable when set forth in so lucid and carefully reasoned a judgment as that which Mr. Worsley Taylor, the learned and experienced chairman of the justices of Lancashire, has given in the present case. But in the earlier part of the passage which I have quoted from Lord Mersey's judgment, where he lays stress upon the inference of intention, as a valuable clue to the solution of such a question as the present case requires us to consider, I entirely concur.

I turn now to the facts. I appreciate, I hope, sufficiently the strength of the case of the corporation as that case is stated in

(1) [1909] 1 K. B. 78, at p. 84.

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C. A. the chairman's judgment, which forms part of the printed
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LIVERPOOL moorland, nor the fact that the keepers of the sporting tenant
CORPORA- are authorized by the corporation to warn off trespassers, is
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AND
WITHNELL keeps the door of the vacant house locked, and authorizes the
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—
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the chairman's judgment, which forms part of the printed case. I agree with him that neither the fencing of this moorland, nor the fact that the keepers of the sporting tenant are authorized by the corporation to warn off trespassers, is a fact which ought in itself to affect our judgment. I suppose that the owner of a vacant house, who, according to the decisions and the practice, is not rateable as its occupier, keeps the door of the vacant house locked, and authorizes the police as well as his servants to prevent the intrusion of trespassers. I agree also that the making and maintenance of certain grips and drains in the planted portion of the area for the adaptation of that ground for plantations is slight, if any, evidence of occupation. Agricultural land may none the less be vacant land, in the eye of rating law, because it is drained land. Nor does the letting of sporting rights for which the lessee is rated help to constitute "occupation" on the part of the landowner. I recognize the plausibility of the statement that the benefit to the corporation in this case arose, not from the beneficial use of the land, but from the power to prevent an injurious one. But upon the whole—for, as I have stated, I think that the question which the facts stated in the special case raise is a difficult one—I think, if one balances the evidence, there is on the facts a preponderance in favour of the contention of the assessment committee. I think that the facts shew that the corporation has such a beneficial user of this land, and such an intention, for the purpose of enjoying and maintaining such user, of continuous control, enabling the corporation at their will to enter upon the land, and to deal with the land as it pleases, that the inference of rateable occupation is the proper inference. The land has been bought, and is used by the corporation as a gathering ground for pure water. The power at any moment to enter upon, and to interfere with, the land, for the purpose of maintaining or bettering the execution of that purpose, involves, it seems to me, the intention to occupy. I understand it not to be denied by the appellants that, if the corporation had placed and maintained upon the land works, however simple, for collecting or diverting water, an "occupation" would have been created. At present the contour of the land renders any such

artificial work unnecessary for the purpose of getting and maintaining its beneficial user. If beneficial user exists, and if beneficial user affords good ground for the inference of rateable occupation, it appears to me that the presence of artificial works cannot be essential to proof, but that, when it is proved, it strengthens of course the evidence of such occupation.

If upon this, the principal point, the judgment of the Divisional Court is affirmed, there remains only one other subsidiary point to be mentioned; for, although the reported judgments, as I read them, shew that in some way the learned judges were left by the arguments under the impression that the contention of the assessment committee as to the rateability of the corporation in respect of their occupation of the gathering ground related only to 859 acres out of the 1165 acres, and that as to the remaining 306 acres the corporation were rated separately as occupiers of woodlands and nurseries under the Rating Act of 1874, s. 4, and the only question, in the words of the Lord Chief Justice, was whether they ought to be rated at an enhanced value because there is water running through them, this misconception, if it existed, was corrected in the order as afterwards drawn up, upon which this appeal comes before us. The only other question, therefore, as to which I need to say anything, if the hypothetical questions (2.) and (3.) do not arise, because the whole area of 1165 acres is rateable as being beneficially occupied as a gathering ground, is whether or not evidence of the price paid by the corporation is admissible as a basis for calculating the assessment for rating purposes, or, in other words, whether the interest upon that price is some evidence of the rent which an occupying tenant of the gathering ground would pay. I think it is. The law appears to me to be correctly stated by Mr. Ryde at p. 176 of the second edition of his work on Rating. He says: "The measure of rateable value is defined by statute as the rent which may reasonably be expected; interest on cost or on capital value cannot be substituted for the statutory measure, but can be looked at as *prima facie* evidence in order to answer the question of fact what rent a tenant may reasonably be expected to pay." He justifies this statement by the judgment of Cave J. in 1885

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C. A. in *Reg. v. School Board for London*. (1) I agree at the same
 1911 time with the judgment of Vaughan Williams L.J. that in regard
 LIVERPOOL to the 306 acres used as plantations and nurseries there is a
 CORPORATION question still to be considered and decided by the quarter sessions.
 v. It may be found that a rent might be got for them from a tenant
 CHORLEY from year to year as plantations and nurseries, and, if so, as
 ASSESSMENT Mr. Ryde also correctly states in the passage to which I have
 COMMITTEE referred, it will be the rent to be reasonably expected which will
 AND constitute the proper basis for assessment for rating. I agree
 WITHNELL that the appeal should be dismissed with the usual consequences.
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Appeal dismissed.

Solicitors for appellants: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

Solicitors for respondents: *Crowders, Vizard, Oldham & Co., for Stanton & Sons, Chorley.*

E. L.

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County Court—Remitted Action—Amendment of Particulars of Claim—Jurisdiction of County Court Judge—Claim for Breach of Contract—Amendment of Particulars by Addition of Claim founded on Tort—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65—County Court Rules, 1903, Order XIV., r. 12; Order XXXIII., r. 2.

An action commenced in the High Court by a writ specially indorsed with a claim for 40*l.* 16*s.* for the price of goods sold and delivered, work and labour done, and materials supplied was remitted to the county court under s. 65 of the County Courts Act, 1888. In the county court the plaintiff amended his particulars by adding a claim based in substance upon collusion and fraud on the part of the defendant's surveyor:—

Held, that, although the action had been turned into one comprising a composite claim in contract and tort which could not have been remitted to the county court under s. 65, the county court judge had, under that section and the County Court Rules, 1903, Ord. XIV., r. 12, and Ord. XXXIII., r. 2, jurisdiction to entertain the action with the

(1) (1885) 55 L. J. (M.C.) 33, at pp. 37, 38.

claim which had been so amended after remittal, and to allow or disallow the amendment as in the exercise of his discretion he thought fit.

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APPEAL by the plaintiff from a decision of the judge of the Edmonton County Court. The plaintiff Spring, a builder, commenced an action in the High Court on May 25, 1911, by a writ specially indorsed with a claim for 40*l.* 16*s.* for the price of goods sold and delivered, work and labour done, and materials supplied.

Upon an application for judgment under Order xiv., an affidavit was filed on behalf of the defendant which contained the allegations (*inter alia*) that by a contract in writing dated March 7, 1911, the plaintiff agreed to do the work for a total sum of 39*l.* 1*s.* 6*d.*, and that it was a condition of the contract that the work should be done to the satisfaction of the defendant's surveyor. It was further alleged in the affidavit that the work had not been done to the satisfaction of the surveyor as provided for by the contract. On June 12, 1911, upon that affidavit leave was given to the defendant to defend, and the case was remitted to the county court under s. 65 of the County Courts Act, 1888. (1)

(1) County Courts Act, 1888, s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which the action might have been commenced, or in any Court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be

tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the Court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein"

County Court Rules, 1903, Order xiv., r. 12: "A plaintiff may file and deliver amended particulars of demand . . . at any time before the return day without obtaining any order for the purpose; . . . but the judge at the trial if satisfied that the opposite party has not had a reasonable opportunity of preparing

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The order for the remittal of the action was lodged with the registrar in the county court on June 17, 1911, and the action was set down to be heard on July 21, 1911.

On July 5, 1911, the plaintiff filed amended particulars of claim by which, in addition to claiming the sum of 40*l.* 16*s.* for work done and materials supplied for the defendant at his request, he claimed "a like sum as being due on a quantum meruit on the ground inter alia that the defendant's surveyor is wrongfully and collusively refusing to express satisfaction with the plaintiff's work."

Upon the case coming on for trial on July 21, 1911, it was objected on behalf of the defendant that the county court judge had no jurisdiction to try an alternative claim in tort (joined to a claim in contract) where the action had been remitted to a county court under s. 65 of the County Courts Act, 1888.

The county court judge upheld the objection and nonsuited the plaintiff.

The plaintiff appealed.

Merlin, for the plaintiff. The county court judge was wrong in holding that he had no jurisdiction to try the action. After remission to the county court the action became a county court action for all purposes and the claim could be amended in any way the plaintiff thought fit. That is clearly the effect of the language of the County Courts Act, 1888, s. 65, and Order xxxiii., r. 2, of the County Court Rules, 1903. It follows that under Order xiv., r. 12, of the County Court Rules, 1903, and s. 87 of the County Courts Act, 1888, the plaintiff could amend his particulars of claim in the manner he did, and the county court judge had jurisdiction to try the action with the particulars so amended. In *Spencer, Whatley &*

his case to meet any new matter introduced by such amendment, or for any sufficient cause, may disallow the amendment, or may adjourn the trial, and may make such order as to costs as he may think fit."

Order xxxiii., r. 2, provides that where an action is remitted from the

High Court to a county court "the registrar shall forthwith indorse on the order or duplicate thereof the date on which the same was lodged, and file the same, and the action . . . shall proceed in all things as if it were an ordinary action in the court . . ."

Underhill v. Forster & Co. (1) it was held that after the remission of an action from the High Court to the county court the county court judge had power to amend the particulars of claim by substituting a claim for unliquidated damages, and it is clear from the decision in *Harris & Sons v. Judge* (2) that the remitted action becomes a county court cause. [The Annual County Courts Practice, 1911, pp. 514, 515, and *Bowles v. Drake* (3) were also referred to.]

S. Lynch, for the defendant. The county court judge had no jurisdiction to entertain the particulars of claim as amended. If the action before it was remitted had comprised a claim in tort it could not have been remitted to the county court except upon an affidavit made by the defendant as to the plaintiff's want of means under s. 66 of the County Courts Act, 1888: *Reg. v. Judge of the Marylebone County Court*. (4) The effect of the amendment in the county court was that the county court judge was asked to try an action based on conspiracy which could not have been remitted to him in the circumstances of the present case.

HAMILTON J. This is an appeal from a decision of the judge of the Edmonton County Court, who refused to hear the action in the form in which it came before him and therefore nonsuited the plaintiff. The matter comes before us as a pure question of jurisdiction without our being in any way invited or disposed to fetter or direct the mode in which the learned judge should exercise his jurisdiction.

The facts were that an action was commenced by the plaintiff, a builder, in the High Court to recover the sum of 40*l.* 16*s.* for work and labour done and materials provided, the defence being that the work was done under a special contract, and that without the certificate of the defendant's surveyor the plaintiff was not entitled to recover. An order was made under s. 65 of the County Courts Act, 1888, that the case should be remitted to the county court. After it had been so remitted, the plaintiff, purporting to exercise the powers given him by the County Court Rules, 1903,

(1) [1905] 1 K. B. 434.

(2) [1892] 2 Q. B. 565.

(3) (1881) 8 Q. B. D. 325.

(4) (1883) 50 L. T. 97.

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Order xiv., r. 12, introduced into his particulars of claim what was really matter for reply, and set up collusion and fraud on the part of the defendant's surveyor. These amended particulars of claim came before the county court judge, and it was submitted to him on the part of the defendant that the action had now become substantially an action based on fraud affecting the personal character of the defendant and his surveyor, and it was said that that was a form of action which could only have been remitted to the county court on the application of the defendant under s. 66 of the County Courts Act, and was, moreover, an action which no defendant would have thought of asking to have remitted. The county court judge decided that he had no jurisdiction to try the case, which had been turned into a composite claim in contract and tort. It therefore becomes necessary for us to decide that point alone.

There is in my judgment a distinction between the conditions which determine whether there is power to remit an action to the county court, and the status of the action when remitted and the powers of the judge to whose Court it is remitted over it. Under s. 65 of the County Courts Act, 1888, the conditions are specified under which an action of contract brought in the High Court may be remitted, and they must, no doubt, for the purpose of the exercise of that jurisdiction, be strictly observed. The section provides, however, that when the application is made the judge shall, "unless there is good cause to the contrary, order such action to be tried accordingly; . . . and the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein." It appears to me from the language of that section that when an order is made for the remittal to the county court of an action, which in the High Court satisfies the conditions necessary to give the High Court the power of remittal, all the proceedings therein, after such remittal, are to be tried and taken as if the action had originally been commenced in the county court. The County Court Rules, 1903, carry the matter a little further; Order xxxiii., r. 2, provides that where an action is remitted from the High Court to a county court the action shall proceed "in all things as if it were an ordinary action in the Court." In my judgment the exercise of the powers given by Order xiv., r. 12, of the County Court

Rules, 1903,—both the power of the plaintiff to amend, and the power of the judge for sufficient cause to disallow the amendment,—are things which come within the words “as if the action had been originally commenced therein” in s. 65 of the County Courts Act, 1888, and also within the words “in all things” in Order xxxiii., r. 2, of the County Court Rules, 1903. In my view, therefore, upon the true construction of the Act of 1888 and the rules made thereunder, the county court judge had jurisdiction to try the action in its amended form. Had the cause of action been one of those which by statute the county court is incapable of hearing, that express exemption from the jurisdiction of the Court would have overridden any amendment the plaintiff might have made. That would be consistent with the words of s. 65 of the Act of 1888 “as if the action had been originally commenced therein.”

There are authorities which although not absolutely in point may be usefully referred to. *Moody v. Steward* (1) and *Bowles v. Drake* (2) were decided under s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), which contains words substantially the same as those in s. 65 of the County Courts Act, 1888. These decisions assume that not only is the High Court divested of all jurisdiction in the remitted action, after the remittal order is made, but also, in the words of Brett L.J. in *Bowles v. Drake* (2), that “it is practically transferred to the county court with all the consequences attendant thereon.” In *Spencer, Whatley & Underhill v. Forster & Co.* (3) the Divisional Court decided that where an action had been commenced for a liquidated sum payable as demurrage for the detention of waggon, and the action had been remitted to the county court, it was competent to the county court judge to make an amendment which claimed unliquidated damages in lieu of a liquidated sum for demurrage at a specified rate, and language is there used applicable to a wider set of circumstances than those involved in that case, language which is, I think, applicable to the present circumstances. “It seems to me,” said Lord Alverstone C.J., referring to the words in s. 65 of the County Courts

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(1) (1870) L. R. 6 Ex. 35.

(2) 8 Q. B. D. 325.

(3) [1905] 1 K. B. 434.

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Act, 1888, "that those words must have been intended to give to the county court judge the same powers of amendment in a remitted action as he would have had if the action had been commenced in the county court." Authority, therefore, seems to me to support the construction I should have given independently of it to the words of the statute and the orders and rules made under it, and I think that the county court judge was wrong in holding that he had no jurisdiction to try the amended claim of the plaintiff.

The case, therefore, must go back to the county court to be dealt with—I do not say to be tried—by the learned judge, exercising as he may be invited to do by the parties or as he may see fit in his own discretion the powers which he possesses so as to do justice between the parties in the particular circumstances of the case. For these reasons I am of opinion that this appeal must succeed.

BANKES J. I am of the same opinion. The point on which we are asked to give our decision does not appear to have been raised before. It arises in this way. Sect. 65 of the County Courts Act, 1888, gives power to a judge of the High Court to order a certain class of action to be tried in the county court. That class, to use the words of the section, is confined to "any action of contract brought in the High Court" in which "the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding one hundred pounds." The present action was commenced in the High Court and was confined to a claim for goods sold and delivered, work and labour done, and materials supplied. Now the words "the claim indorsed on the writ" have been held in *Bassett v. Tong* (1) to exclude cases where the claim is for unliquidated damages. In *Spencer, Whatley & Underhill v. Forster & Co.* (2) the point discussed was whether a county court judge, on an application made to him by a party whose action has been remitted under s. 65, has power to amend the claim so as to convert

(1) [1894] 2 Q. B. 332.

(2) [1905] 1 K. B. 434.

it from an action in which the claim was for liquidated damages into one in which the claim was for unliquidated damages and therefore one which could not in that form have been remitted to the county court. In that case it was decided that the powers of amendment which the county court judge has include such a power, on the ground that s. 87 of the County Courts Act, 1888, which gives him his power to amend, is wide enough to cover such a case.

The precise point decided in that case is, however, not before us, because Mr. Merlin on behalf of the plaintiff contended that the power given to a party under Order xiv., r. 12, of the County Court Rules, 1903, of amending his particulars applies to any action in the county court, whether it was originally commenced there or was remitted there, provided the amendment seeks to raise a cause of action which could have been included in an action properly commenced in the county court. I agree with my brother Hamilton that the words of the County Court Rules, 1903, and s. 65 of the County Courts Act, 1888, are wide enough to give such powers, but I wish to point out that I do not agree with Mr. Merlin's contention that the power of amendment given to a party under Order xiv., r. 12, of the County Court Rules, 1903, is a power to amend as of right, because it seems to me that the rule read as a whole does not give an absolute right, but a qualified one, and that the qualification is to be found in the latter part of the rule which provides that in certain cases the judge, although the amendment has been made in time, may disallow it. I agree that the present case comes within the rule; but although we decide that the learned judge has jurisdiction to deal with the matter, it still remains open to him on the application of either party to consider whether he should act under the last words of the rule by allowing this amendment or disallowing it as he thinks fit. For these reasons I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Hill & Merson.*

Solicitor for defendant: *E. G. T. Courtenay.*

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Solicitor — Professional Misconduct — Debt - collecting Agency — Champerty — Solicitors Act, 1888 (51 & 52 Vict. c. 65).

A solicitor who was party to the formation of a debt-collecting company financed it and controlled its affairs with a view to its employment by him as an adjunct to his business as a solicitor. By the agency of the company he systematically solicited debt-collecting business without disclosing his connection with the company and with a view to procuring for himself the business of recovering the debts.

The terms upon which he, by the agency of the company, solicited debt-collecting business and upon which he was proved to have conducted the proceedings in two actions were that he charged a certain commission on the amount recovered only, namely, on amounts under 50*l.* 2½ per cent. (not less than one shilling on any amount), and on sums over 50*l.* 2½ per cent. on the first 50*l.* and 1½ per cent. on the remainder, in addition to out-of-pocket expenses sanctioned by the members of the company and not recovered from the debtor. In unsuccessful cases no charge was made either by the company or the solicitor, except for actual out-of-pocket expenses. He included on each indorsement on the writs of summons in the two actions a claim for his costs, although by the terms upon which he conducted the proceedings the plaintiffs were not to pay him any professional charges.

Upon an application against the solicitor made to the Committee of the Law Society that his name might be struck off the roll of solicitors of the Supreme Court, or that he might be suspended from practice as a solicitor, or that such other order might be made as the Court should think right, on the ground that there had been professional misconduct on his part, the Committee reported that he had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888, and that the terms upon which he conducted the actions were champertous:—

Held, that upon the facts the Committee were justified in finding that the solicitor had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

Held, further, that the terms upon which he conducted the actions amounted in law to champerty.

Definition of “infamous conduct in a professional respect” on the part of a medical man in *Allinson v. General Council of Medical Education and Registration* [1894] 1 Q. B. 750, applied to professional misconduct on the part of a solicitor.

REPORT of the Committee appointed under the Solicitors Act, 1888.

An application was duly made by C. H. Heddon, of 1, Station

Bridge, Harrogate, Yorkshire, solicitor, that Arthur William Gilling, of 2, Princes Square, Harrogate, solicitor, might be required to answer the allegations contained in an affidavit which accompanied the application, and that his name might be struck off the roll of solicitors of the Supreme Court, or that he might be suspended from practice as a solicitor, or that such other order might be made as the Court should think right, on the ground that the matters of fact stated in the affidavit constituted professional misconduct on the part of the said Arthur William Gilling in his capacity of solicitor of the Supreme Court of Judicature in England.

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The charges made were :—

(1.) That the respondent procured the formation of "Patten's Agency, Limited," being a company formed (*inter alia*) to undertake the recovery of debts for its subscribers, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor.

(2.) That whether the respondent procured the formation of the company or not, he, with the like view, from its inception financed and controlled it.

(3.) That the respondent commenced and carried on certain actions for the recovery of debts placed in the hands of the company for collection upon terms which were champertous and improper.

(4.) That the respondent by the agency of the company systematically solicited debt-collecting business, and that he did so without disclosing his connection with the company.

It appeared from the report of the Committee that on March 24, 1910, a private company named "Patten's Agency, Limited," was incorporated under the Companies (Consolidation) Act, 1908, the object for which the company was established as stated in the memorandum of association being (*inter alia*) "to afford to members and subscribers facilities and economy in the collection and recovery of their debts, and to undertake debt-collecting services, upon such terms as may from time to time be determined." The nominal capital of the company was 3000*l.* divided into 1000 preference and 2000 ordinary shares of 1*l.* each.

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Certificates for 300 preference shares (Nos. 1 to 300) and 350 preference shares (Nos. 301 to 650), dated March 30, 1910, and April 18, 1910, respectively, both in the name of F. W. Patten, a director of the company, and a certificate for 200 preference shares (Nos. 801 to 1000) in the respondent's name, dated April 18, 1910, were produced to the Committee.

The only persons entered on the register of members, besides Patten and the respondent, were the original subscribers to the memorandum of association, S. B. Lupton and S. Dearnley, of Harrogate, printers, to each of whom one ordinary share was entered as allotted on March 30, 1910; Louis Sikes, of Roundhill, Masham, civil engineer, to whom on April 18, 1910, 150 preference shares (Nos. 651 to 800) were allotted, payment being made in cash on the same date; and William Wright, of Harrogate, accountant, to whom 1450 ordinary shares (Nos. 3 to 1452) were allotted on August 22, 1910, "in consideration of assignment of certain benefits to the company."

On July 25, 1910, the respondent addressed to the manager of Patten's Agency, Limited, a letter of which the following is a copy:—

"As my money is being used for the purpose of exploiting this company I must insist for the proper conduct of its affairs as follows:—

"An audit of the accounts to date.

"Periodical audits at my pleasure.

"All cheques to be countersigned or earmarked by me before payment.

"All accounts to be initialled by me before payment.

"All books, papers, &c., to be kept at the company's office, and open to my inspection, or any person authorized by me at any time.

"No order for expenditure to be given without my consent.

"Yours faithfully,

"Arthur W. Gilling."

With regard to this letter the respondent swore in an affidavit dated January 20, 1911, and made by him in an application for judgment under Order xiv. in Blackburn's case, mentioned below,

that the letter was written by him owing to certain statements being made to him as to certain irregularities, and that as he had advanced money to Patten's Agency, Limited, he had no desire to see it wasted. That as he had no financial interest in the company the letter had been ignored and none of the items enumerated therein had been carried out, and he had not acted upon the letter.

A prospectus (dated 1910) issued by the company was, so far as material, in the following terms.

"PATTEN'S AGENCY, LIMITED, with which is incorporated THE LONDON AND PROVINCIAL MERCANTILE ASSOCIATION.

"Established 1877.

"This association is one of the oldest of the many trade protection societies now existing in England.

"The objects of the society are as follows:—

"4. To collect accounts for members at a nominal charge, and in cases of necessity to take legal proceedings for the recovery of the same with the least possible expense and trouble. . . .

"DEBT COLLECTING DEPARTMENT.

"Applications for debts are made and commission is charged on the amount recovered only; viz., on amounts under 50*l.*, 2½ per cent.—not less than one shilling on any amount—and, on sums over 50*l.*, 2½ per cent. on the first 50*l.*, and 1¼ per cent. on the remainder.

"In all cases where legal proceedings have to be taken to enforce payment, the same commission is charged by the solicitor on the amount recovered, in addition to out-of-pocket expenses sanctioned by the members and not recovered from the debtor. In such cases where commission is due to the solicitor no commission is charged by the society.

"In unsuccessful cases, no charge is made either by the society or its solicitor, except for actual out-of-pocket expenses.

"The solicitor may be consulted by the members on all subjects affecting them as members of the association free of charge."

Ibbotson Arthur Wardman, of the firm of A. B. Wardman & Sons, Limited, of Harrogate, automobile engineers, a witness

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before the Committee called by the applicant, deposed that at the solicitation of Patten he had entrusted to Patten's Agency, Limited, the collection of two debts due to his firm from one Lockwood and one Blackburn respectively. He said that Patten shewed him a prospectus to which he referred him for the terms upon which the agency would undertake his business, and witness added "he told me $2\frac{1}{2}$ per cent." He deposed that he had on occasions, though seldom, employed a solicitor or debt collector to get in debts due to his firm, and had once employed the Trade Protection Society and had been under the impression that Patten's Agency, Limited, was a similar association, and that he had not known until one of the matters came into Court that the respondent was in any way connected with Patten's Agency, Limited.

LOCKWOOD'S CASE.

This was the first of the two cases referred to above. Wardman having instructed Patten's Agency, Limited, to recover from Geoffrey F. Lockwood, auctioneer, the sum of 11*l.* 7*s.* 6*d.*, a summons was issued on October 12, 1910, in the Knaresborough County Court for the amount plus the plaint fee 14*s.* and costs 1*l.* 3*s.* 2*d.* (making altogether the sum of 13*l.* 4*s.* 8*d.*). The respondent acting as solicitor for the plaintiffs (Wardman & Sons, Limited) in the proceedings, Lockwood consulted the applicant, who advised payment into Court of the amount claimed, less solicitor's costs, which was done, and this sum was accepted by the respondent upon behalf of the plaintiffs.

BLACKBURN'S CASE.

This was the second of the two debt-collecting cases deposed to by Wardman as having been entrusted by him to Patten's Agency, Limited. In that instance the respondent, on behalf of Wardman & Sons, Limited, on November 29, 1910, issued a writ in an action in the Leeds District Registry of the High Court of Justice against Lionel G. Blackburn, the claim indorsed on the writ being for the sum of 38*l.* 13*s.* 10*d.* and the sum of 3*l.* 10*s.* for costs, and also, in case the plaintiffs obtained an order for substituted service, the further sum of 1*l.* 5*s.* The applicant, who acted as solicitor for Blackburn, in opposition to

the plaintiffs' application for judgment under Order xiv., made an affidavit in the action, dated December 19, 1910, in which he said (inter alia) that the respondent formed and registered Patten's Agency, Limited, and that the terms of the contract of employment between the plaintiffs and Patten's Agency, Limited, with reference to the taking of legal proceedings were that the solicitor for Patten's Agency, Limited, was to be paid only such costs as the solicitor could recover from debtors, and was not further or otherwise to have recourse to the plaintiffs for any professional remuneration.

An affidavit of the respondent in reply to the above affidavit of the applicant sworn in the same action on January 20, 1911, contained (inter alia) the following statements:—"I did not form or register the company but acted as solicitor to the proposed company. I have never been appointed solicitor to such company and I verily believe that such company employs solicitors other than myself. I have no financial interest in Patten's Agency, Limited, other than as a creditor. I am not a shareholder and the F. W. Patten referred to does not hold shares in such company as my nominee. The said F. W. Patten is the holder of the scrip" for 300 shares in the company "and he is the registered owner of such shares."

The respondent, who gave evidence on his own behalf, deposed (inter alia) before the Committee that he had been in ill-health in the years 1909 and 1910, having undergone three operations in 1909 and another in November, 1910, and had not been able since the first operation to attend to business to any great extent. He said that a Mr. Wright, whom he had known for two or three years, had first, so far as he knew, conceived the idea of Patten's Agency, Limited, and had communicated the idea to the respondent, and that Bryan, his managing clerk, who was helping Wright with the formation, had suggested that he should put money into the company, and that he then advanced 300*l.* for printing, office furniture and other necessary expenses, the whole of which sum he afterwards got back again.

In cross-examination the respondent stated that in March, 1910, in response to his application for 300 preference shares in the company and on payment of 300*l.* he received scrip for

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300 shares (Nos. 1 to 300) registered in Patten's name, together with a blank form of transfer signed by the latter, but that he had not expected this and was surprised at not receiving a certificate in his own name. He did not remember applying for the 350 preference shares (Nos. 301 to 650) in April, 1910, but supposed he had done so, and believed that his interest in a company called the Yorkshire Bone Products Company, Limited, had been transferred to Patten's Agency, Limited, as an equivalent for those shares. He said that he had not received any payment from Patten for the shares to which he had nominated him, but that Patten was under an obligation to him, and that by arrangement between them the blank transfer had been destroyed about May, 1910. The reason he gave for not taking the 350 preference shares in his own name was that he felt that, if he had so taken them, he ought to be appointed a director of the company, and he wished to avoid all responsibility.

The Committee stated that they could not accept unreservedly all the statements of the respondent. They could not accept his evidence that the certificate for the 300 preference shares (Nos. 1 to 300) was issued in Patten's name and sent to the respondent, with a blank form of transfer, without his (respondent's) previous consent or approval; and they believed that Patten held these shares as nominee or trustee of the respondent. Similarly, with reference to the 350 preference shares (Nos. 301 to 650) allotted to Patten, the Committee believed that Patten was merely a nominee or trustee for the respondent.

The Committee found—

(1.) That the respondent was cognizant of and party to the formation of the debt-collecting company called "Patten's Agency, Limited," and that he financed that company and controlled its affairs, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor.

(2.) That by the agency of the company the respondent systematically solicited debt-collecting business, and that he did so without disclosing his connection with the company and with a view to procuring for himself the business of recovering the debts.

(3.) That the terms upon which the respondent by the agency

of the company solicited debt-collecting business, and upon which he was proved to have conducted the proceedings in the two actions mentioned in the report, were champertous.

And upon each and all of these findings and upon the facts appearing in the report the Committee reported that the respondent had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

At the hearing before the Divisional Court counsel for the respondent stated that he must admit that the respondent did advance money to and assist in the formation of Patten's Agency, Limited, and that the respondent's name appeared as a shareholder in the company. He must also admit that Patten was the respondent's nominee and held shares on his behalf. The respondent had disposed of his solicitor's business and was not now practising.

T. T. Paine, for the Law Society. The Committee of the Law Society hold a position which is analogous to that of the General Council of Medical Education and Registration, and their findings must stand unless it can be shewn that they are unreasonable. They have found that touting of the nature of that disclosed in the present case is professional misconduct. In giving judgment in *Allinson v. General Council of Medical Education and Registration* (1) Lopes L.J. said: "Then I come to the question of 'infamous conduct in a professional respect,' and, in my opinion, if there was any evidence on which the council could reasonably have come to the conclusion to which they did come, their decision is final. If, on the other hand, there was no evidence upon which they could reasonably arrive at that conclusion, then their decision can be reviewed by this Court. It is important to consider what is meant by 'infamous conduct in a professional respect.' The Master of the Rolls has adopted a definition which, with his assistance and that of my brother Davey, I prepared. I will read it again: 'If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of

(1) [1894] 1 Q. B. 750.

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good repute and competency,' then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.'"

That passage shews the position in which the General Medical Council stands with regard to the medical profession, and the Committee of the Law Society occupy an analogous position with regard to solicitors. The company was simply the instrument of the respondent. The finding of the Committee that the terms upon which the respondent did the work amounted to champerty was right in law. He received a commission on the amount recovered, and the costs if they were paid by the other side. The commission was something more than he was entitled as of right to receive: *In re Attorneys and Solicitors Act, 1870.* (1)

The practice of demanding costs from the other side which the respondent had agreed not to charge his own client was oppressive. Party and party costs are awarded as an indemnity only, and therefore costs which a solicitor agrees not to charge his client cannot be legally recovered from the other side: *Gundry v. Sainsbury.* (2) By his threat of proceedings if sums including these costs were not paid, the respondent brought pressure to bear upon persons to pay sums which were not legally recoverable from them. [Sects. 4 and 11 of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), were also referred to.]

C. Dwyer, for the respondent. There are a large number of trade protection societies throughout the kingdom, of which Patten's Agency, Limited, is one. The terms on which it does business are similar to those of others. It must be admitted that the respondent was mistaken in saying that he was not interested in the company, as Patten appears to have been his nominee and to have held shares on his behalf. The percentages on the amounts recovered which the respondent was to receive were fixed in order to give the creditor a definite estimate of the expense he would incur in any event. A solicitor may quite legitimately say to his client "I will take less from you for my costs than the sum legally due to me." An agreement by a solicitor to take a percentage

(1) (1875) 1 Ch. D. 573.

(2) [1910] 1 K. B. 645.

on the amount recovered does not necessarily amount to champerty. No doubt an agreement to accept a proportion of the amount recovered so large that the solicitor could not possibly justify it as fees for work done would amount to champerty, e.g., one-tenth, as in *In re Attorneys and Solicitors Act*, 1870. (1) But in the present case the commission is (at the highest) $2\frac{1}{2}$ per cent., and that percentage is fixed merely as an authentication to the client of the amount he will have to pay. It is not fixed with the intention of obtaining a share in the proceeds of the suit. Whether or not an agreement amounts to champerty is a question of fact. The fact that the commission is small is an element to be taken into consideration in deciding whether the agreement is champertous or not.

Bairstow, K.C., and *A. H. Marshall*, for the applicant.

DARLING J. In this case an application was made that the respondent, a solicitor, might be required to answer certain allegations which were made against him by the applicant, who is also a solicitor. The Committee of the Law Society investigated the matter, and their findings are stated in the report which they made. Speaking for myself I think that the findings of the Committee are entirely supported by the evidence. The business which was carried on by Patten's Agency, Limited, was designed practically for the sole advantage of the respondent. He undoubtedly had a very considerable financial interest in it. Patten was merely a nominee of his, who held shares which were bought and paid for by the respondent, and held for his benefit. The shares were held and the agency practically existed for the purpose of bringing business to the respondent which he conducted as a solicitor. That is found by the Committee of the Incorporated Law Society to be professional misconduct. I do not think I need attempt to add anything to the definition which was given in *Allinson v. General Council of Medical Education and Registration*. (2) In that case Lopes L.J. said: "The Master of the Rolls has adopted a definition which, with his assistance and that of my brother Davey, I prepared. I will read it again. 'If it is shewn

(1) 1 Ch. D. 573.

(2) [1894] 1 Q. B. 750.

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that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,' then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.''' A definition could not be more authoritative than one drawn after careful consideration by each of those three learned judges. It was read by Mr. Paine in his argument and is set out at p. 763 of the report of *Allinson v. General Council of Medical Education and Registration* (1) in the *Law Reports*. The Law Society are very good judges of what is professional misconduct as a solicitor, just as the General Medical Council are very good judges of what is misconduct as a medical man. I see no reason for coming to any other conclusion than that to which the Committee of the Law Society has come, namely, that that method of obtaining business is not such as this Court can possibly countenance, and that therefore the Committee was perfectly right in saying that with regard to*that matter there was professional misconduct.

But there was something more. The terms on which the respondent conducted the business were such that they amounted to champerty in law. Champerty, as the word implies, was originally common in times when there was little property of any value except land. Most early litigation was about land, and when the bargain was one which resulted in the partition of a field, what was recovered was *champ parti* between the solicitor and the person who claimed it. One got so much and the other so much, and that was forbidden, because it led to speculative litigation, and the harassing of persons who ought to feel secure in their rights, for the benefit of lawyers and other speculative parties. The facts of this case bring it absolutely within the definition of champerty given in *In re Attorneys and Solicitors Act, 1870* (2), by Sir George Jessel M.R. in his judgment. After dealing with several other points he continued: "I may, however, say, for the guidance of the parties, that the agreement is, in my opinion, pure champerty, as it gives to the solicitor,

(1) [1894] 1 Q. B. 750.

(2) 1 Ch. D. 573.

in the event of success, what is equivalent to a tenth part of the property to be recovered."

Now the respondent had a distinct interest in the amount which he would recover. His commission for bringing an action was to be governed, the percentage being fixed, by the amount recovered. It is perfectly plain, upon the uncontradicted facts which were laid before the Committee of the Law Society, that he tried to get the costs out of defendants in addition to the commission which he would receive from this debt-collecting agency, which was practically carried on in his own office, and with his own money. He would receive something from the plaintiffs, and what he would get from the defendants as well. That was champerty.

I therefore come to the conclusion that the respondent has been guilty of professional misconduct in every respect in which the Committee of the Law Society have found him guilty of it. How did he meet the charges? The Committee have said that he met them by statements which they could not accept. As he made those statements on oath it amounts to this—that on oath he said what the Committee of the Law Society believe to be untrue. Speaking for myself I am quite convinced that he did on oath swear to that which he knew to be absolutely false. Although in fact this agency was formed in his own office for his own benefit, and he put money into it in the name of a nominee, he permitted himself in an affidavit to swear this: "I have no financial interest in Patten's Agency, Limited, other than as a creditor. I am not a shareholder and the F. W. Patten referred to does not hold shares in such company as my nominee"; and "As I have no financial interest in the said company the said letter has been ignored and none of the items enumerated therein have been carried out, neither have I acted upon the said letter." The letter referred to in that passage is that dated July 25, 1910, which is set out in the report. It is impossible to reconcile that letter with the statement in his affidavit. The letter was written before his conduct came into question; the affidavit was made to excuse his conduct. Mr. Dwyer, who argued this case upon his behalf with very great ability, has been unable to give any explanation of that letter

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which I can accept. It seems to me it is a very grave blot on the conduct of the respondent, that after writing such a letter as that he could have permitted himself to make an affidavit containing the passages which I have read. I will not indicate anything about the disciplinary part of our decision until my brothers have given judgment.

HAMILTON J. But that no decision closely bearing on such circumstances as these seems yet to have been given, I should not have thought it necessary to do more than concur in what has fallen from my learned Brother. It would be enough to say that the facts entirely warrant—as conclusions of fact—the findings of the Committee.

It is neither necessary nor desirable to define what connection a solicitor may legitimately have with debt-collecting societies, or societies for the mutual protection of their members; still less can we offer any criticism of debt-collecting societies with which solicitors are not connected, or draw, from the charges they make and the system they follow, any conclusion that can be of any guidance in the present case. It is obvious that the conduct of a solicitor in his profession must be judged by the rules of his profession and by the standard which its members set up not only for their brethren, but for themselves. It is inconsistent with the proper conduct of a solicitor in his profession that he should do that which was done in this case, namely, connect himself with a so-called debt-collecting society incorporated and registered under the Companies Acts, but controlled by himself so as to make it an adjunct or instrument for the collection of business which he may take into Court in cases where it is profitable to do so. It is inconsistent with the honourable conduct of his profession that he should take business of that sort from clients without disclosing his connection with the company, which was the device under which he was carrying on this system, and it is also inconsistent with professional conduct that he should do the business upon the terms with regard to costs which are shewn to have been his practice in the present case. Those terms are referred to in the company's prospectus as the charge of a percentage commission on the amount recovered only,

but there was also on the part of the respondent an endeavour—doubtless often successful—to obtain costs from the litigant on the other side, who might think it better to pay what was asked than to dispute liability as to costs. Furthermore, in the course of this inquiry—an inquiry which I think it right to add seems to me to have been properly initiated by the applicant, and as to which I can see no justification for any suggestion that it originated in rivalry or ill-will—a statement made by the respondent upon oath that “the F. W. Patten referred to does not hold shares in such company as my nominee” was before the Committee. That statement is now admitted to be false, and, although it is no separate item of professional misconduct, it is a matter which ought to be visited with censure. The respondent clearly has perjured himself.

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Hamilton J.

BANKES J. I only desire to add that it is necessarily involved in the view which I take of the findings of the Committee that they must have come to the conclusion that Patten's Agency Limited, was, if not a mere sham, at any rate a mere creature of the respondent. I come to that conclusion because in their first and second findings they have expressed themselves in this way : they say that the solicitor “financed that company, and controlled its affairs, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor,” and “that by the agency of the company the respondent systematically solicited debt-collecting business.” I have no hesitation in saying that, given those circumstances, I am of opinion that the finding of the Committee of professional misconduct was thoroughly justified by the facts. I do not desire to express any opinion as to how far a solicitor may or may not legitimately associate himself with a genuine debt-collecting agency. That question does not arise in the present case and I express no opinion upon it. We are confining our judgment entirely to the facts as brought before the Committee in this particular case, and to the conclusion at which they arrived upon those facts.

DARLING J. The conclusion of the Court is that the respondent has been guilty of professional misconduct, and with regard

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to his punishment we have been told that he is not at this moment practising, having disposed of the business which he had. But apparently he has still a certificate with which he might practise. There is nothing before us to shew whether he has finally retired from practice or not, and we think that it should be put out of his power to practise for some time, even should he desire to do so. The order of the Court is that he be suspended for twelve months and pay the costs of the inquiry and of this motion.

Order accordingly.

Solicitor for Law Society: *S. P. B. Bucknill.*

Solicitor for respondent: *A. W. Gilling, Harrogate.*

Solicitors for applicant: *Hair & Co., for C. H. Heddon, Harrogate.*

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[IN THE COURT OF APPEAL.]

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Dec. 4, 5.

BROWNE *v.* BLACK.

Solicitor—Bill of Costs—Delivery of Bill—One Month before Action—“Sent by the post”—Time—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.

By s. 37 of the Solicitors Act, 1843, no solicitor shall commence any action for the recovery of any fees, charges, or disbursements “until the expiration of one month after such . . . solicitor . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements.”

By s. 48 “month” means calendar month.

Held (by Vaughan Williams L.J. and Kennedy L.J., Buckley L.J. dissenting), that a bill is not “sent by the post” to the party to be charged one month before action unless it was posted at such a time that it would in the ordinary course of post be delivered to the party to be charged one clear calendar month before the commencement of the action.

Decision of Divisional Court (1) affirmed.

APPEAL from the judgment of a Divisional Court (Ridley and Channell JJ.) on an appeal from the Mayor’s Court. (1)

(1) [1911] 1 K. B. 975.

The action was brought by a solicitor to recover the amount of a bill of costs for professional services rendered by him to the defendant as his solicitor. The defendant pleaded (so far as material) that the plaintiff did not one calendar month before action deliver to the defendant, being the party to be charged therewith, or send by post to or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements subscribed by the plaintiff or enclosed in or accompanied by a letter signed by him, as required by s. 37 of the Solicitors Act, 1843. (1)

At the trial before the Common Serjeant it was proved that the plaintiff on the afternoon of February 15, 1910, posted a signed bill of costs addressed to the defendant at his place of business in the City, which in the ordinary course of post was delivered to the defendant on the morning of February 16. The action was commenced on March 16.

The Common Serjeant held that the word "month" in s. 37 meant a clear month, and that the words "sent by the post" were not complied with unless the bill was posted at such a time that in the ordinary course of post it would be delivered to the party chargeable one clear month before the commencement of the action. He accordingly held that the action was premature and was not maintainable.

The Divisional Court affirmed his decision.

Foots, K.C., and *H. M. Sturges*, for the plaintiff. The natural meaning of the words "sent by the post" is "put into the post."

(1) 6 & 7 Vict. c. 73, s. 37: "No attorney or solicitor . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor until the expiration of one month after such attorney or solicitor . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known

place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor . . . or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill . . ."

Sect. 48: "In the construction of this Act the word 'month' shall be taken to mean a calendar month . . ."

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They do not mean "delivered through the post." There is no ground for construing the words otherwise than in their natural meaning. The statute says nothing about the bill being posted at such time that a clear month shall have elapsed between the date on which it would be delivered in the ordinary course of post and the commencement of the action. Take the converse case, and suppose that the provision had been that the solicitor must sue within a month after the date when the bill was sent by the post. Could it have been then contended with success that the time would not begin to run from the date when the bill was posted? The fact that the construction contended for by the plaintiff would involve that the interval of time between the actual delivery of the bill and action brought might be a day less than it would be if one of the other alternatives given by the section were adopted is really not a substantial objection to the plaintiff's contention. Having regard to the varying length of the different calendar months, on any construction of the section the interval which the client would have before he could be sued would vary by a day or two according to the month in which the bill was delivered. Suppose the solicitor died after posting the bill on the same day, could he be said to send the bill on the next day? The intention was that delivery to a trusty messenger, namely, the public post, should be equivalent to leaving the bill at the client's address. [They cited *Dunn v. Hales* (1); *Macgregor v. Keily* (2); *Blunt v. Heslop* (3); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26. (4)]

[VAUGHAN WILLIAMS L.J. referred to *Reg. v. Inhabitants of Slawstone*. (5)]

Lewis Thomas, K.C., and *Neilson*, for the defendant. Sect. 37 of the Solicitors Act, 1843, is an enactment intended to be in favour of the client, and to ensure his having a certain interval of time for consideration of the bill before an action can be

(1) (1858) 1 F. & F. 174.

(2) (1849) 3 Exch. 794.

(3) (1838) 8 Ad. & E. 577.

(4) The second point argued in the Court below, namely, that the word

"month" in s. 37 of the Solicitors Act, 1843, does not mean a clear month, was abandoned by the plaintiff's counsel.

(5) (1852) 18 Q. B. 388.

brought against him ; and it ought, therefore, to be construed favourably to the client, and not so that, if one of the alternative modes of delivering the bill be adopted by the solicitor, a shorter period would be allowed him. [They cited *Engleheart v. Moore* (1); *Reg. v. Recorder of Richmond* (2); *In re Railway Sleepers Supply Co.* (3)]

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VAUGHAN WILLIAMS L.J. The words of 2 Geo. 2, c. 23, s. 23, were as follows: "No attorney or solicitor of any of the Courts aforesaid shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode a bill of such fees, charges, and disbursements," &c. It will be seen that that section gave to the solicitor two alternatives. He might either deliver the bill to the client in person, or he might leave it for him at his dwelling-house or last place of abode. The words of s. 37 of the Solicitors Act, 1843, are these. [The Lord Justice here read the section.] Sect. 48 of the Act provides that the word "month" as used therein shall mean a calendar month. The difference between the earlier Act and the later Act is that the latter enables the solicitor to send his bill by post, and, when dealing with the places at which the bill may be left, mentions his "counting-house" and "office of business," as well as his "dwelling-house, or last place of abode." I mention those matters as being not unimportant, when we have to deal with the construction of the later statute and to see how far the various modes of delivering the bill of costs are in contrast to one another. Now the Act of George II. interfered with the common law rights of solicitors, and forbade the bringing by a solicitor of an action for his bill of costs until the expiration of one month or more after delivery of his bill in the manner therein described. I cannot myself doubt that the additional words in the Solicitors Act, 1843, s. 37, "sent by the post to," were introduced in the

(1) (1846) 15 M. & W. 548.

(2) (1858) E. B. & E. 253.

(3) (1885) 29 Ch. D. 204.

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interest of, among others, attorneys and solicitors, in order to enable them to avail themselves of the increased postal facilities.

I cannot agree with the suggestion which has been made as to the spirit in which we should construe those words. It has been suggested that we ought to construe them against the solicitor, and in favour of the party to be charged, because the section is one which was manifestly introduced in favour of that party. It is equally true that the section is one which infringes on the common law rights of a certain class, and, that being so, ought to be construed strictly, and so as not to infringe on those rights any further than was manifestly on the face of the section intended. I am of opinion that the words "sent to" in the expression "sent by the post to" in the section mean "sent to," not "received by,"—which I understand to have been also the view of the Divisional Court. I see nothing in the judgments of Ridley J. and Channell J. to suggest that they thought that the expression "sent to" imports receipt of the bill by the client; what they decided appears to have been that a bill of costs is not duly "sent by the post" within the meaning of the section unless posted at such a time that it would in the ordinary course of post be delivered to the party to be charged one clear calendar month before the day on which the action is commenced, excluding the day of such delivery and also the day on which the action is commenced. I think that this is the right view, although I do not adopt either the suggestion that "sent by the post" means so sent by the post as that it was received one clear calendar month before the commencement of the action, or the suggestion that the statute means that the party to be charged shall always have a clear calendar month for consideration of the items of the bill before he is sued. For the purpose of testing the meaning of the section, there were suggested during the argument several cases by way of illustration, to which, however, I do not attach very much weight. For instance, the case was suggested where the party to be charged happens to be away from home at the time when the bill is sent, and it was asked whether he was to have a calendar month in which to consider the charges. As I have already said, I do not think that the statute means that the party to be charged must necessarily

have a full month for the consideration of the bill, provided only that the alternative mode of sending through the post is carried out in accordance with the section. Then a case was suggested which seems to involve a little more difficulty. It was suggested that, in the case of the party to be charged residing at some distant place abroad, if the words "sent by the post to" are not construed as referring to receipt through the post, practically the party to be charged might in some cases get no opportunity for consideration of the bill at all. I am not disposed upon any such grounds to put what I think to be a wrong construction on the language of the section.

I wish now to say a few words about the cases which were cited to us. In *Macgregor v. Keily* (1) Parke B. said: "It is open to the plaintiff to select any mode of delivery which the statute authorizes. He may deliver the bill to the defendant personally, or, according to the construction put on the other Act, he may deliver it to an agent authorized to receive such bill, or he may rely on its being sent by post, or left otherwise at the dwelling-house or last place of abode of the defendant. But having selected his mode, he must prove to the satisfaction of the jury, a delivery by himself or his agent, or some one authorized by him." It was held in that case that there was evidence of a delivery of the bill to the defendant, but I agree that the observations of Parke B. which I have read do rather favour the view contended for by the plaintiff. Another case cited was *Dunn v. Hales* (2), where Watson B. is reported as saying at nisi prius, "Upon the special plea the simple question is, whether the bill signed was put into the post properly addressed to the defendant." I agree that that is an expression of opinion by a judge sitting at nisi prius which favours the contention of the plaintiff. The case of *Blunt v. Heslop* (3) was relied upon by Ridley J. as being an authority in favour of the defendant, but, speaking for myself, I do not quite see what application that case has to the present question. It does not appear to me to turn upon the question with which we have here to deal, namely, whether the words "sent by the post to" import that the bill must have been posted at such

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(1) 3 Exch. 794.

(2) 1 F. & F. 174.

(3) 8 Ad. & E. 577.

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a time that a clear month has elapsed between the time when in the ordinary course of post it would have been delivered and action brought. In the case of *Reg. v. Inhabitants of Slawstone* (1) there are in the judgment delivered by Lord Campbell C.J. some observations which appear to me strongly to support the view taken by the Divisional Court in this case. He said: "It seems to me that there is no difficulty in construing stat. 11 & 12 Vict. c. 31, s. 9. The effect of that section is that a notice of appeal must be held to be given at the time when, according to the ordinary course of post, (if it be sent by post under stat. 14 & 15 Vict. c. 105, s. 10) it would reach the party to whom it is sent. The notice in the present case, therefore, was given within the proper time. The same interpretation must apply to the word 'sending' with respect to the copy of the depositions." That case is not precisely in point to the present, so far as the facts and the statutes in question are concerned, but still it is a case in which the Court of Queen's Bench did put a construction on the words of a statute similar to that which the Divisional Court put upon the words of s. 37 of the Solicitors Act, 1843. The defendant's counsel relied upon *Reg. v. Recorder of Richmond*. (2) Excepting that in that case *Reg. v. Inhabitants of Slawstone* (3) was referred to, and followed, I do not think that it helps the defendant very much. Having regard to those authorities, and bearing in mind that the enactment with which we are dealing is one that, for the reason which I have given, ought to be construed strictly, I do not think that I shall be straining or doing violence to its terms if I construe the words "sent by the post to" as meaning that the bill must have been posted at such time as that in the ordinary course of post it should have reached the client a clear month before the action was commenced. For these reasons I think that the judgment of the Divisional Court was right and that this appeal must be dismissed.

BUCKLEY L.J. On February 15 the solicitor put into the post a letter addressed to the client, at his office of business, enclosing

(1) 18 Q. B. 388, at p. 392.

(2) E. B. & E. 253.

(3) 18 Q. B. 388.

the bill of costs. If that act constituted a sending of the bill by the post to the client, within the meaning of the section, the month had elapsed before the action was brought, and the plaintiff is entitled to succeed. The question, therefore, to be determined is whether the posting of that letter was a sending of the bill by the post to the client within the meaning of the section. Sect. 37 of the Solicitors Act, 1843, is a section which suspends an existing cause of action. It debars the solicitor for a certain time from doing that which he would otherwise be entitled to do, namely, sue for the amount of his bill. The period of a month may be shortened under a proviso at the end of the section under circumstances which are therein mentioned. The point to be investigated is whether, within the meaning of an enactment expressed in very intelligible English, the plaintiff had performed such an act as that the month had expired before the action was commenced. The particular words which have to be construed, reading the relevant words, are these: "No attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees . . . for any business done by such attorney or solicitor until the expiration of one month after such attorney or solicitor . . . shall have . . . sent by the post to" one of various places mentioned "a bill of such fees" duly signed. In ordinary English, "sending" something means, I think, "dispatching" it. If I say that on a certain day I "sent to" some one a brace of pheasants, I mean that I sent them to him on the day when I dispatched them, although he may not receive them till a time when they will be of no use to him. That is the ordinary meaning of the words. I have to consider the section and see whether the words are used in any other sense. The words "sent by the post to" were introduced by way of amendment of the legislation contained in the statute 2 Geo. 2, c. 23, and they are contrasted with the words "left at" which were found in that statute, and are found in the present statute. The principal object of them I think was this. Under the earlier Act, if the solicitor elected to take the latter of the alternatives mentioned in that Act, he had to prove that the bill had in point of fact been left, that it had reached its destination. The words "sent by the post to" relieve the solicitor of that

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1911 particular agent, namely, the Post Office, to say that, whether
BROWNE the bill reaches its destination or not, he has done all that is
v. required of him by the Act when he has posted a letter containing
BLACK. his bill addressed to the client at one of the places mentioned.
Buckley L.J. It seems to me quite plain that there is not to be found in the
words of the statute that which the judges in the Divisional Court
appear to have thought that they found there, namely, that the
client is to have a clear month's time to consider the items in the
bill. Both judges say that such is the intention. Ridley J. says
"The object of the enactment is to give the client a month in
which to consider the items in the bill, and if necessary to take
advice upon them." Channell J. says "The object of the
enactment is to give the client a clear month in which to con-
sider items in the bill and to decide what course he will take
thereon," and further on he says "I cannot think that
the solicitor can by resorting to the medium of the post office
deprive the client of one day in the month which is allowed to
him by the section to consider the bill," I do not agree with
the view so taken by the learned judges. I agree that the
intention was that a clear month should elapse between the date
at which the solicitor does the act which the statute requires
and the date at which he may commence his action, but
I see nothing in the section to shew that the dispatch of
the bill must be so effected as that it shall result in the receipt
of the bill by the client at such time as will give him a
clear month in which to consider the items in the bill.
There are no words in the section to that effect, and I think
that the contrary may be shewn in various ways. Take this case
by way of illustration. Suppose that, the month being August or
September, the client has gone to Norway for a holiday—and I
will even assume, though I think it makes no difference, that the
solicitor knows that to be the case—and that the solicitor delivers
his bill of costs on some day in the month at the client's counting-
house, or office of business. It is plain that in that case the client
would not receive it in Norway, even if his clerk were diligent,
and forwarded it at once, in such time as to give him a clear
month in which to consider the bill. It is, nevertheless, plain

that the terms of the section would have been complied with by the solicitor, and the month would run from the day on which the bill was so delivered. Therefore it is, in my opinion, erroneous to say that the object of the section is to give the client a month to consider the bill. The words do not import that, but import that a month is to elapse between the delivery or sending by the post of the bill and the date when the action is commenced. Whether the client can consider it during the whole of that time, or not, depends upon where he is, and when the bill actually reaches his hands. That being so, I have to apply my mind to the expressions "sent by the post to," and "left for him at," one of the places mentioned. Assume for a moment that the words "by the post" were not in the Act, and that the words were merely "sent to or left for him at." There is a contrast in those expressions. Had those been the words, it might have been contended that, if the solicitor sent a messenger with the bill, he would have "sent it to" the place, within the meaning of the section, whether it was actually delivered at that place or not. The Legislature, however, did not intend to leave such a contention open: the solicitor is not to dispatch the bill by any messenger whom he chooses; he must dispatch it by a particular agent, if he is going to avail himself of that alternative; he must send it "by the post." It seems to me that the section affirms that, if the solicitor employs the particular agency which is thus authorized, then the dispatch of the bill is to be sufficient, whether it reaches its destination or not. That alternative is contrasted with actual "delivery at" one of the places mentioned. It seems to me that the two alternatives given by the section operate with relation to different points of time. If the solicitor adopts the authorized agency, and sends the bill by the post, then the proper moment to be looked to is the moment of his so sending it; if on the contrary he adopts the other alternative, namely, that of leaving it for the client at one of the places mentioned in the section, then the date of its delivery at that place is the material point of time, and not the date of sending it. If the considerations relied upon by the Court below were accurate, that is to say if I could find in the section that the client must have a clear month for the consideration of the bill,

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I should have been of a different opinion. It is because I cannot find any indication in the section that such is the intention that I think that their fair meaning must be given to the words. In my opinion, therefore, when the plaintiff here entrusted the letter containing his bill to the authorized messenger, namely, the post office, on February 15, he had "sent" it "by the post to" within the meaning of the section, and it is immaterial that this was not done—assuming that to have been the case—in time to enable the letter to be delivered till the 16th. I think that the relevant moment is the moment at which the solicitor did the act required by the statute, namely, "sent by the post," the agent authorized by the section, the document in question. The month had run from that date before the action was commenced. For these reasons I think that the appellant is entitled to succeed.

KENNEDY L.J. In my opinion this appeal fails. I agree with the judgment of the Divisional Court affirming that of the learned judge of the Mayor's Court. We have, no doubt, to construe the section without varying, or departing in any way from, the fair meaning of its terms, as applied to the subject-matter to which they relate; but we are, I think, entitled to consider its provisions with regard, not only to the decisions upon enactments in *pari materia* which preceded the passing of the statute in question, and were in force till superseded by that statute, but also to the reasonableness and justice of the view of those provisions presented to us. Before the passing of the statute which we have to construe there was in force a statute in *pari materia*, 2 Geo. 2, c. 23, s. 23. Without taking up time by reading the provisions of the earlier statute, it is enough to say that they were, in substance, to the same effect as those of the section in question, in so far as they provided that, before the expiration of a month or more from the delivery of the bill in one or other of the modes of delivering it mentioned by that statute, the attorney or solicitor should have no right to bring an action for his bill. It has been pointed out more than once that the object of that enactment was that the client should have an opportunity of considering for a reasonable time the charges

sought to be made against him. As far back as in 1789, in *Brooks v. Mason* (1), where an attorney sued for the amount of his bill, and was nonsuited at the trial, the circumstances being that he had delivered a bill, but had taken it back again, the Court said "that the bill ought to have been left with the defendant, as it was the intention of the statute that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary." That case was referred to, and the purpose of the statute was again judicially declared, in the case of *Blunt v. Heslop*. (2) That case is not exactly in point to the present, but the purview of the statute was again stated. Littledale J. puts the matter shortly thus: "The words being 'one month or more,' we must suppose that the client was intended to have a full month after the delivery of the bill." Then came the Solicitors Act, 1843, s. 37, which also imposes a restriction in point of time upon an attorney's or solicitor's right to sue for his charges in respect of work done by him. It is thereby provided that he shall not be entitled to sue "for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor until the expiration of one month after" the events therein mentioned. I do not see any substantial difference between the expression "one month" in that section and the expression "one month or more" in the earlier enactment. This section adds to the two alternative modes of delivering the bill mentioned in the earlier statute another mode, namely, sending it "by the post" to the client "at his counting-house, office of business, dwelling-house, or last known place of abode." The solicitor has now, therefore, an option to take one of three alternative modes of delivering his bill. He may deliver it to the client in person; or he may leave it for him at one of the places mentioned; or he may send it by the post to one of those places. I must say, speaking for myself, that, with regard to alternatives, such as those given in s. 37, which relate to the same subject-matter, namely, the period of time which is to elapse before an action can be brought, it appears to me impossible, according to the

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(1) (1789) 1 H. Bl. 290.

(2) 8 Ad. & E. 577.

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1911 by the language used to do so, to take the view that the
BROWNE alternatives so given are intended to have a different effect with
v. regard to the length of that period of time, as would be the case
BLACK. if the contention for the plaintiff were correct. According to
Kennedy L.J. that contention, instead of the client having the period of time,
before he could be sued, which he would have, if the solicitor
adopted the alternative of leaving the bill for the client at
one of the places mentioned in the section, he would only
have a shorter period; because, if the plaintiff's contention is
right, the solicitor might post the letter enclosing the bill just
before midnight on some day so that it could not be delivered
till the next day, and the time would, nevertheless, begin to run
from the day on which the letter was posted. I must confess
that I regard that as an impossible construction of the section.

Having regard to the ordinary use of language, I do not think
that the construction contended for by the plaintiff is the natural
construction to put upon an enactment like this giving alterna-
tive methods of procedure directed to the same object, namely,
the period of time which is to elapse before an action can be
brought. It appears to me that, without varying or departing
from the fair meaning of the words used, they may be construed
as meaning that, if the solicitor adopts the alternative of sending
the bill by the post, he must post it in such time as will give a
clear month from the time when it would be delivered in the
ordinary course of post, before he commences his action, and I
agree with Vaughan Williams L.J. that this is the proper construc-
tion of the section. One must consider the Act from a business
point of view. If the plaintiff's contention is right, a solicitor
might post his bill to a client residing in some far distant place in
the British dominions or elsewhere abroad, and he would have
satisfied the section, though it might be physically impossible,
having regard to the time when the bill was posted, that it should
reach the client so as to give him even a single day of the month
which the section intends that he shall have before he can be
sued. There are many places in the British dominions to which
this observation would apply. If the section is construed as the
Divisional Court has construed it, no difficulty or incongruity

would arise. It is suggested that there is nothing in the section to shew that it was intended to bear that construction. All I can say is that the same words strike different minds differently. I think that the plain object of the section was to give another alternative mode of serving the bill on the client, but not to diminish the period of time which under the previous Act had been thought reasonable. I agree that, if one had merely to consider the words "sent by the post to" apart from their context, it might be that they would mean merely "put into the post," but one must construe them by the light of the context. Channell J. correctly points out that the post office cannot be treated as the authorized agent of the client to receive the bill, which is what the interpretation contended for by the plaintiff invites us to treat the post office as being. In regard to this point, we have some authority. In *Reg. v. Inhabitants of Slawstone* (1), as Vaughan Williams L.J. has pointed out, it was held, quite apart from the argument that in 11 & 12 Vict. c. 31, s. 9, the expression "sending" as regards the copy of the depositions and the expression "giving" as regards the notice of appeal should be construed reciprocally, that the effect of the section was that the notice of appeal must be held to be given at the time when according to the ordinary course of post it would reach the party to whom it was sent. It seems to me that the words "sent by the post to" in s. 37 ought to be construed as the Common Serjeant and the Divisional Court have construed them, namely, as meaning that the bill must be sent by the post at such time that, if the bill is delivered in the ordinary course of post, the client may, before he can be sued, have the same interval for the consideration of the bill as he would have had if the solicitor had adopted either of the other alternative modes of delivering the bill given by the section. That appears to me to be a reasonable construction of the section, and one which is supported by more than one decided case.

Appeal dismissed.

Solicitors for plaintiff: *Woodthorpe, Browne & Co.*

Solicitors for defendant: *Robert Greening & Sigs.*

(1) 18 Q. B. 388.

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Company—Statement in Form of Balance-Sheet audited by Company's Auditors—Duty to forward Statement to Registrar of Companies—Penalty for omitting to forward Statement—"Private Company"—Limitation by Articles of Number of Members of Company to fifty—Number of Members in fact in excess of fifty—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26, sub-s. 1, 2, 3, 5; s. 121, sub-s. 1; s. 285.

By s. 26 of the Companies (Consolidation) Act, 1908, every company except a private company is required once at least in every year to forward to the Registrar of Companies a statement in the form of a balance-sheet audited by the company's auditor, and in default of complying with the requirements of the section is liable to a penalty.

By s. 121, sub-s. 1, "For the purposes of this Act, the expression 'private company' means a company which by its articles—

"(a) restricts the right to transfer its shares; and (b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company."

The articles of a company contained the restrictions, limitations, and prohibitions mentioned in clauses (a), (b), and (c) respectively of s. 121, sub-s. 1, of the Act, but in each of two years the number of its members (exclusive of persons in the employment of the company) in fact exceeded fifty. Informations laid against the company for having in each of the two years respectively made default in forwarding to the Registrar of Companies a statement in the form of an audited balance-sheet as required by s. 26 were dismissed by a magistrate upon the ground that the company was still a private company within the meaning of s. 121 and was therefore not bound to forward the statement:—

Held, that the decision of the magistrate was right inasmuch as a company whose articles contain the restrictions, limitations, and prohibitions mentioned in clauses (a), (b), and (c) of sub-s. 1 of s. 121 remains a "private company" within the meaning of the definition contained in the section even though those restrictions, limitations, and prohibitions are not in fact complied with by the company.

CASE stated by a metropolitan magistrate.

On March 13, 1911, an information was preferred by the Solicitor to the Board of Trade on behalf of the Registrar of Companies against the respondents, the Royalties Syndicate, Limited, for that they being a company registered under the Companies Acts, 1862 to 1900, and having a capital divided into shares, did on September 14, 1910, make

default in forwarding to the Registrar of Companies a copy of the company's list of members with summary as to capital and shares, &c., for the year 1909, together with the statement in the form of a balance-sheet, audited by the company's auditors, required under s. 26 of the Companies (Consolidation) Act, 1908 (1), and that the default had since continued for the space

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(1) Companies (Consolidation) Act, 1908, s. 26, sub-s. 1: "Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company."

Sub-s. 2: "The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying" certain particulars mentioned in the sub-section.

Sub-s. 3: "The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance-sheet, audited by the company's auditors, and con-

taining a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance-sheet need not include a statement of profit and loss."

Sub-s. 5: "If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty."

Sect. 121, sub-s. 1, re-enacting s. 37, sub-s. 1, of the Companies Act, 1907 (7 Edw. 7, c. 50): "For the purposes of this Act the expression 'private company' means a company which by its articles—

"(a) restricts the right to transfer its shares; and

"(b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

"(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company."

Sub-s. 2: "A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by

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of 151 days thereafter, to wit, up to and including March 11, 1911, and still continued.

A similar information was on the same date preferred by the same informant against the respondents for that the respondents did on January 12, 1911, make a similar default in respect of the year 1910, and that the default had since continued for the space of fifty days thereafter, to wit, up to and including March 11, 1911, and still continued.

The informations were heard by the magistrate on March 29, 1911. The appellant Park was a minor staff officer of the Companies Registration Department, Somerset House, duly acting in place of the informant.

Upon the hearing of the informations the following facts were admitted:—

The Royalties Syndicate, Limited, was on June 17, 1908, incorporated under the Companies Acts, 1862 to 1900, as a company limited by shares, and the company had a nominal capital of 30,000*l.* divided into 30,000 shares of 1*l.* each.

The articles of association of the company contained inter alia the following provisions:—

“1. . . .

“‘Private company’ has the meaning assigned thereto by the Companies Act, 1907, section 37.”

“4. The company is a private company, and the number of

filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.”

Sub-s. 3: “Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.”

Sect. 285: “In this Act, unless

the context otherwise requires

‘Articles’ means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the Schedule annexed to the Joint Stock Companies Act, 1856, or in Table A in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of that Act, or in Table A in the First Schedule to this Act.”

its members (exclusive of persons who are in the employment of the company) shall at no time exceed fifty, nor shall the public be invited to subscribe for any shares or debentures of the company. Accordingly, the company may commence its business and exercise its borrowing powers as soon after the incorporation of the company as the directors shall think fit and notwithstanding that part only of the shares may have been allotted."

Then followed a series of clauses restricting the right to transfer the shares of the company.

An annual list and summary as required by s. 26 of the Companies Act, 1862 (25 & 26 Vict. c. 89), was duly forwarded to the Registrar of Joint Stock Companies on October 3, 1908, and shewed that the number of members of the company on the fourteenth day after the general meeting in 1908 was eighteen.

An annual list and summary for the year 1909 was on January 10, 1910, forwarded by or on behalf of the company to the Registrar of Joint Stock Companies, which the registrar refused to accept on the ground that the summary did not include a statement in the form of a balance-sheet, audited by the company's auditors and giving the particulars specified in s. 26, sub-s. 3, of the Companies (Consolidation) Act, 1908.

The last-mentioned annual list and summary shewed that the number of members of the company on the fourteenth day after the general meeting in 1909 exceeded fifty.

No annual list and summary for the year 1909 which included the statement in the form of a balance-sheet before referred to had been forwarded to the Registrar of Joint Stock Companies.

No annual list and summary for the year 1910 which included a statement in the form of a balance-sheet had been forwarded to the Registrar of Joint Stock Companies, but an annual list and summary, without the inclusion of the statement, was duly tendered.

On the fourteenth day after the ordinary general meeting of the company in the year 1910 the number of members of the company exceeded and still exceeds fifty, exclusive of persons in the employment of the company.

No alteration had been made, either by special resolution or

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otherwise, in the articles of association of the company above set out since the date of the incorporation of the company.

On the part of the appellant it was contended that the company, by reason of the fact that the number of its members at the dates mentioned in the annual list and summaries tendered to the registrar for the years 1909 and 1910 exceeded fifty, was no longer a private company within the meaning of s. 121 of the Companies (Consolidation) Act, 1908, and was no longer entitled to the immunities of a "private company" as defined by the section; that in particular the company, having ceased to be a private company, was not exempt, under s. 26, sub-s. 3, of the Companies (Consolidation) Act, 1908, from the obligation to include in the annual lists and summaries for the years 1909 and 1910 respectively a statement in the form of a balance-sheet pursuant to the section; and that the company, having failed to forward to the Registrar of Joint Stock Companies annual lists and summaries, including those statements for the years mentioned respectively, was in default in that regard in respect of both years.

On the part of the respondents it was contended that the company had not ceased to be a private company within the meaning of s. 121 of the Companies (Consolidation) Act, 1908; that the definition of "private company" contained in the section was applicable to the company by reason of the fact that by its articles the company restricted the right to transfer its shares and limited the number of its members (exclusive of persons who were in the employment of the company) to fifty and prohibited any invitation to the public to subscribe for any shares or debentures of the company; that inasmuch as that clause remained unaltered, by special resolution or otherwise, it was immaterial for the purposes of the section that the number of members of the company in fact exceeded fifty; that the company being a private company was within the exception as to private companies contained in s. 26, sub-s. 3, of the Companies (Consolidation) Act, 1908, and was not bound to include in its annual list and summary the statement in the form of a balance-sheet therein referred to; and that as the company had forwarded to the registrar within the due dates

annual lists and summaries for the years 1909 and 1910 respectively, as required by the Act of 1908, there had been no default.

The magistrate was of opinion that although the number of members of the company in fact exceeded fifty the company had not ceased to be a private company as defined by s. 121 of the Companies (Consolidation) Act, 1908, and that there had been no default, and accordingly he dismissed the informations.

The question for the opinion of the Court was whether the magistrate upon the above statement of facts came to a correct determination in point of law.

Sir Rufus D. Isaacs, A.-G., Sargant, and Raeburn, for the appellant. Private companies were first recognized by the Companies Act, 1907 (7 Edw. 7, c. 50), which was repealed by the Companies (Consolidation) Act, 1908, and now forms part of that Act. By s. 2 of the Act of 1908 only two subscribers are required for the purpose of forming a private company, the definition of which is contained in s. 121. Very important immunities are given to private companies by the Companies (Consolidation) Act, 1908. By s. 26, sub-s. 3, the summary contained in the annual list of members which the section requires a company to make and forward to the Registrar of Companies need not in the case of a private company include the statement in the form of a balance-sheet, audited by the company's auditors, required by the section in the case of other companies. By s. 65, sub-s. 10, the provisions of that section as to the forwarding and filing of "the statutory report" do not apply to a private company. Sect. 72, sub-s. 3, s. 82, sub-s. 2, s. 85, sub-s. 7, s. 87, sub-s. 6, s. 114, sub-s. 2, and s. 115 also confer very important privileges and immunities upon private companies. The question in the present case is whether the company was in 1909 and 1910 and still is a private company within the meaning of s. 121 of the Companies (Consolidation) Act, 1908, although in those years the number of its members exceeded fifty and still exceeds that number. If it is a private company it need not include in its annual list and summary the statement in the form of a balance-sheet required by s. 26 of the Act of 1908. If the true construction of s. 121 is that a

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company remains a private company although the number of its members has been increased to more than fifty since its incorporation it will in effect reduce the articles of association so far as they limit the number of the members to fifty to waste paper, for a company whose articles limit the number to fifty might in fact have 5000 shareholders. In order to prevent s. 121 having an absurd effect the words "which by its articles" limits the number of its members to fifty must be read as "which in fact and by its articles" so limits them. The intention of the Legislature was that the three matters respectively mentioned in clauses (a), (b), and (c) of sub-s. 1 of s. 121 of the Companies (Consolidation) Act, 1908, should be contained in a private company's articles in order that a person contemplating applying for shares might see what the conditions applying to the company are. Sect. 121 of the Act of 1908 must mean that the company must take care to see that the articles are complied with. Otherwise there is nothing to prevent a private company having at any time 150 or 15,000 or any other number of shareholders. It cannot have been intended that the number of shareholders should be immaterial so long as there is a restriction on paper. Sub-s. 3 of s. 121 of the Act of 1908 shews that it was intended that the number of shareholders should be strictly limited to fifty, for it provides that if two or more persons are jointly interested in a share they shall be considered as one member. If it was not intended to limit the number of members to fifty there would be no necessity for that provision. The definition of "articles" in s. 285 shews that the restriction as to the number of members must be contained in the articles as originally framed and as altered by special resolution. Sub-s. 2 of s. 121, which enables a private company by passing a special resolution and doing certain other acts to turn itself into a public company, does not mean that that is the only way in which a private company may become a public one. In the present case the true question is not whether the company has completely become a public company, but whether it has ceased to be a private company within the meaning of the Act of 1908 entitled to all the immunities conferred by the statute. No doubt sub-s. 5 of s. 26 which provides that a company shall be

liable to a penalty in default of compliance with the provisions of the section, must be construed strictly, but if the only meaning that can be given to the words of the statute which would not be an absurd one is that contended for on behalf of the appellant, the Court will give that meaning to them.

Gore Browne, K.C., and *Heber Hart*, for the respondents. The company is still a private company within the meaning of the Companies (Consolidation) Act, 1908. It is clear that the only way in which it can become a public company is by complying with the provisions contained in s. 121, sub-s. 2, of the Act. In giving judgment in *Trevor v. Whitworth* (1) Lord Macnaghten said: "When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed." The decision in *Baroness Wenlock v. River Dee Co.* (2) affords another illustration of the same principle. The Legislature used the words in s. 121 of the Companies (Consolidation) Act, 1908, with a knowledge of the effect they would have and an intention that they should have that effect; for a person going to Somerset House and inspecting the articles of this company at once knows that he is dealing with a private company. He would therefore know that he was dealing with a company which was free from many restrictions which a public company is subject to, such as the inability to commence business before the "minimum subscription" has been subscribed imposed by s. 87 of the Act and the other immunities contained in the sections which have been cited on behalf of the appellant. But he could not know from the documents at Somerset House whether the articles had in fact been complied with, and therefore if the words "and in fact" are added to s. 121 after the words "by its articles" the result would be that the person inspecting the register of documents would never be certain whether the company was a private company or not. For instance, if the register of shareholders shewed that there were sixty members he could not tell how many of these were in the employment of the company, and if in fact there were ten or more the result would be that under s. 121, sub-s. 1 (b),

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(1) (1887) 12 App. Cas. 409.

(2) (1885) 10 App. Cas. 354.

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the company would be a private one without his being able to discover it. But as the section is drafted he knows at once from the fact that the articles limit the number of the members exclusive of employees to fifty that it is a private company. So if a strike occurred and a number of employees were members who ceased for the time being to be employed by the company, it would immediately become a public company if the number on strike was sufficiently large to bring the number of members who were no longer employed by the company over fifty, but a person inspecting the register could not ascertain that fact. Again, it is often a matter of great doubt and difficulty to determine whether there has been an invitation to the public to subscribe for shares or debentures within the meaning of s. 121, sub-s. 1 (c), and a person would be in a state of utter uncertainty as to whether he was dealing with a private company or not if it depended not merely upon whether the invitation was prohibited by the articles, but upon whether the invitation had in fact been given. For these reasons the words of s. 121 are chosen so as to be absolutely specific. The restrictions contained in the section are for the benefit of the shareholders, not of the public. If the directors violate the provisions of the articles they can be removed from their position or restrained by injunction. The object the Legislature had in view was to enable the shareholders to determine from time to time whether the three things mentioned in s. 121 should be done. If the Legislature had so intended, it would have been quite easy to define a private company as one with not more than fifty members. In order to support the contention on behalf of the appellant it is necessary to add to s. 121, sub-s. 1, a fourth clause (d) containing the words "and complies with the provisions of its articles accordingly." The object of sub-s. 3 of s. 121 was to enable a private company to have more than fifty holders of shares. If it were not for that sub-section the private company could not have more than fifty members without there being a risk of an injunction being applied for against the directors, though many of the members were joint holders of shares. The sub-section is necessary in the case of a member dying and appointing more than one executor, or a married woman transferring shares held by her to the trustees of

her marriage settlement. [Palmer's Company Law, 9th ed., p. 123, was also referred to.]

Sir Rufus D. Isaacs, A.-G., replied.

LORD ALVERSTONE C.J. In my judgment the decision of the magistrate was right. It is impossible to adopt the argument of the Attorney-General without disregarding the nature of the proceedings taken by the informant and the principles applicable to them. The respondents were summoned under s. 26, sub-s. 5, of the Companies (Consolidation) Act, 1908, for making default in complying with the requirements of the section. The section is not merely one authorizing an action to be brought to recover a penalty for the breach of its provisions but it subjects the company for the breach to criminal proceedings. It was decided in *Reg. v. Tyler and International Commercial Co.* (1), under ss. 26 and 27 of the Companies Act, 1862, which contain provisions corresponding to those in s. 26 of the Companies (Consolidation) Act, 1908, that the proceedings by which the penalty is enforced are criminal. It follows upon the ordinary principles applicable to criminal proceedings that in order to succeed the appellant must shew a default and that the respondents are liable to a penalty for such default.

With regard to the point made by the Attorney-General on behalf of the appellant that the summary which sub-s. 3 of s. 26 of the Act of 1908 requires to be sent to the Registrar of Companies must include the statement in the form of a balance-sheet audited by the company's auditors in every case except where a company is a private company, it is not necessary to deal with his argument as to what it is desirable that the Legislature should enact. I conceive that many things may be said for and against that view. We are, however, dealing with legislation which so far as the question before the Court is concerned first made its appearance in the Companies Act, 1907, and was then embodied in the Companies (Consolidation) Act, 1908. In those circumstances in order to uphold the contention on behalf of the appellant the Court must be satisfied that it is clear from the language of s. 26 coupled with the other material

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(1) [1891] 2 Q. B. 588.

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sections of the Act of 1908 that this company has made the default with which it is charged, or, to put it in a more concrete form, the Attorney-General has to shew that the exception with regard to a private company does not apply to the present case. For that purpose the words of the statute alone must be considered. Accordingly, I find that in s. 121 it is enacted that "for the purposes of this Act the expression 'private company' means a company which by its articles" does certain things. If the Legislature had so desired, a private company might have been defined by the statute as "a company which in fact restricts the right to transfer its shares" or as a company "which in fact consists of only fifty members" or "which in fact prohibits any invitation to the public to subscribe for its shares or debentures," or it might have contained an enactment that "if the provisions of the articles are broken in any one of those respects it shall be deemed to be a public company" or "shall be a public company for the purposes of this Act." Another method of accomplishing the same object, which although it would not justify these proceedings might justify others, would have been to add to s. 121 a clause which said that if the provisions of the articles of association were broken in any one of those respects the directors of the company should be liable to a penalty.

The Attorney-General admits quite frankly that he has to shew that in order that a company may be a private company within the meaning of the statute it is necessary not only that the articles should restrict, limit, and prohibit, in the manner required by s. 121, but also that in fact those articles should not have been broken by the subsequent conduct of the company. He contends that s. 121 means a company "which by its articles restricts and which acts in accordance with those articles." That contention involves reading into the statute words which are not to be found in it. The other sections to which our attention was called do not throw any light upon this matter. A number of sections vary the procedure in constituting a private company from that which is followed in the case of a public company, as, for instance, the number of persons who have to sign the memorandum of association, and there are several other provisions which confer exemptions upon

private companies with regard to certain matters. No penalty appears to be attached to the omission on the part of a public company to do any of the acts required by those sections, and that fact strengthens the view which I hold, namely, that in order to succeed the Attorney-General must shew a statutory liability on the part of this company to the penalty he asks us to impose upon it, and he can only do so by construing s. 121 in such a way as to add to it language which it does not contain or by construing it in a way which in my view is inconsistent with its terms, namely, by looking at the actual facts instead of the provisions contained in the company's articles. I express no opinion as to whether or not the reasons urged by Mr. Gore Browne are sufficient to justify the Legislature in defining a private company with reference to its articles. The language is clear and I cannot escape from it.

Sub-s. 3 of s. 121 does not present any difficulty, because it seems to me that the sub-section is required for the guidance of the directors themselves. Suppose it turns out that at the very time the articles are being framed there are a large number of persons, not in the employment of the company, but who are trustees under marriage settlements or other instruments and have interests in the business which is about to be formed into a company. The sub-section is necessary for the guidance of the directors, and means that in enumerating the members of the company where two or more persons hold one or more shares in a company they are for the purposes of this section to be treated as one member. The expression "for the purposes of this section" in sub-s. 3 of s. 121 means that in any case where the number of the members of a company is to be limited by its articles to fifty the directors may count a certain number of persons as only one member. The sub-section is wanted in order to enable directors to know whether, having regard to the articles, the company can truly be said to be one "which by its articles limits the number of its members to fifty."

In my judgment, therefore, it is quite impossible to construe s. 121 in the manner in which the Attorney-General invites us to construe it without reading into it words which it

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1911 does not contain, and the fact that s. 26 is a penal section
 PARK which by sub-s. 5 makes persons liable to be criminally dealt
 v. with for a breach of the provisions of the section is in my
 ROYALTIES view conclusive against so construing it. According to the
 SYNDICATE, ordinary principles of the criminal law there must be, in order
 LIMITED. to render a person criminally liable, clear language enacting
 Lord Alverstone that that liability is to exist. Sect. 121 does not contain any
 C.J. such language, and, therefore, I think the decision of the
 magistrate dismissing the information was right.

HAMILTON J. I agree, and as the matter is of importance I will express my reasons. Sect. 26 of the Companies (Consolidation) Act, 1908, of which the penal sub-section forms part, imposes upon all companies an obligation to deliver a statement in the form of an audited balance-sheet except where the company is a private company. It is true that the language of s. 26, sub-s. 3, is "where the company is" and not "where it has been" a private company, but whether the company is a "private company" or not depends upon s. 121, which fixes for the purposes of the Act the meaning of that expression. In order to give effect to the argument on behalf of the appellant either the words "by its articles" must be deleted from sub-s. 1 of s. 121, or to clauses (a), (b), and (c) a further clause (d) must be added in the terms "and continues to observe such restrictions, limitations, and prohibitions." Sect. 121 does not deal with a company which in fact restricts the right to transfer its shares, which in fact consists of only fifty members, and which in fact refrains from any invitation to the public, but with a company which restricts rights and prohibits invitations and limits the number of its members "by its articles" by which alone it could restrict the right to transfer shares or prohibit an invitation to the public to subscribe for shares or debentures. The purpose of sub-s. 1 of s. 121 is to make the articles (not the register of shareholders) the real test by which the meaning of a "private company" is to be ascertained, and it is in that sense that I understand sub-s. 3, which is the insertion by statute in the articles of all private companies of a definition of "member" which might quite easily, if it were left to the

draftsman of the articles, fail to be stated as fully as it ought to be. Where the number of members is to be limited to a specified number of persons, it is necessary to avoid ambiguity by indicating what "a person" means in that connection. Hence sub-s. 3 contains the words "for the purposes of this section," that is to say, in the case of a private company the Legislature for clearness' sake has thought fit to say that—whether the articles of such a company do or do not contain a sufficient definition—where two or more persons hold one or more shares in the company jointly they shall be treated as a single member.

Further, sub-s. 2 of s. 121 provides an express mode in which a private company may turn itself into a public company. There is no definition of a public company in the Companies (Consolidation) Act, 1908. A public company appears to be simply one which is not a private company. There is no intermediate state or tertium quid, and therefore, if it is expressly provided how a private company may turn itself into a public company, namely, by passing a special resolution and filing a certain statement, that in itself negatives any right to turn itself into a public company by the simple process of disregarding its articles. In my judgment it cannot turn itself into anything else but a public company, and, having been a private company, can only become a public company in the manner provided by the statute.

BANKES J. I agree. I feel constrained to come to the same conclusion as my brothers, although I should have been glad if I could have arrived at a different one, because I quite realize that the effect of our decision is to enable persons to say one thing and to immediately do the exact opposite, and by taking that course to escape the penalty imposed by s. 26, sub-s. 5, of the Companies (Consolidation) Act, 1908, upon persons who make default in complying with the conditions or requirements of that section. Sect. 121 is a definition section, and it defines a private company for the purposes of the Act as a company which by its articles does certain things, including limiting the number of its members to fifty. If I could have been satisfied that except by readings s. 121

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in the way in which we were invited to read it by the Attorney-General it is not possible to give any meaning to sub-s. 3 of that section, I should have felt at liberty to accept the construction which he invited us to place upon it, but Mr. Gore Browne in his argument on behalf of the respondents has suggested a possible meaning which may be given to the sub-section, and although I think that the language employed is very inapt to express that meaning, I cannot go so far as to say that it is not a possible meaning of the sub-section, and on that ground I am unable to escape from the plain language of sub-s. 1, which confines the definition of a private company to one which by its articles has professed to have taken or agrees to take a certain course, although in fact it has never intended or attempted to carry out that course.

Appeal dismissed.

Solicitor for appellant: *Solicitor to Board of Trade.*

Solicitor for respondents: *L. W. Taylor, for Gordon-Place & Plummer, Leicester.*

J. E. A.

LONDON COUNTY COUNCIL, APPELLANTS *v.* KIRK,
RESPONDENT.

1912

Jan. 12.

Revenue—Armorial Bearings—Licence to use—Member of Royal College of Veterinary Surgeons—Use of Arms of College—Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 18; s. 19, sub-s. 13.

The respondent, who was a member of the Royal College of Veterinary Surgeons and practised as a veterinary surgeon, used notepaper for his business (not private) purposes, at the head of which there was a device consisting of the arms of the college stamped in black on a shield stamped in relief, the whole being enclosed in a circular device bearing the words "William Kirk, Veterinary Surgeon." Apart from such device there was nothing on the notepaper to indicate that the respondent was a member of the college. The respondent did not, but the college did, take out a licence under s. 18 of the Revenue Act, 1869, to wear or use armorial bearings. Upon an information against the respondent for using armorial bearings without a licence, the magistrate came to the conclusion that the respondent only used the device to indicate that he was a veterinary surgeon and a member of the college, and he held that for a member of the college to use the recognized armorial bearings of the college to indicate his membership thereof was not "using" armorial bearings within the meaning of the Act; and he dismissed the information:—

Held, that the respondent "used" the armorial bearings within the meaning of the section and ought to have taken out a licence for that purpose.

CASE stated by a metropolitan police magistrate.

An information was laid on behalf of the appellants against the respondent, William Kirk, charging him with having on December 2, 1910, used certain armorial bearings without having a proper licence as required by the Revenue Act, 1869. (1)

(1) 32 & 33 Vict. c. 14, s. 18:
"There shall be granted, charged, levied, and paid for the use of Her Majesty, in and throughout Great Britain . . . the following duties, that is to say:

"For armorial bearings—

"If such armorial bearings shall be painted, marked, or affixed on or to any carriage - £2 2 0

"If such armorial bearings shall

not be so painted, marked, or affixed, but shall be otherwise worn or used - - £1 1 0

"And such duties respectively shall be paid annually upon licences to be taken out under the provisions of this Act by the person who . . . shall wear or use the armorial bearings . . ."

Sect. 19, sub-s. 13: "'Armorial bearings' means and includes any

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Upon the hearing of the information the following facts were proved or admitted :—The respondent practised as a member of the Royal College of Veterinary Surgeons at 9, Bayley Street, W.C. In connection with and for the purposes of his business and practice he used and had used for many years past certain headed notepaper, which was his ordinary business (not private) notepaper, and he was using the said notepaper on the day alleged in the information. At the head of the notepaper on the left there was a device which consisted in the centre of the proper arms of the Royal College of Veterinary Surgeons stamped in black on a description of shield stamped in relief on the paper, the whole being enclosed within an ornamental circular device bearing the words “William Kirk, Veterinary Surgeon.” There were no words to indicate that the arms were those of the Royal College of Veterinary Surgeons. Under the device the respondent's telephone number was printed, and on the right was the address where the respondent practised. Apart from such device there was nothing upon the notepaper to indicate that the respondent was a member of the Royal College of Veterinary Surgeons. No licence in pursuance of s. 18 of the Revenue Act, 1869, had ever been taken out by the respondent authorizing him to wear or use the said armorial bearings. The Royal College of Veterinary Surgeons took out annually under the said Act a licence to use and wear the said armorial bearings. There were about 3000 veterinary surgeons in England who were members of the said college. The respondent used the said headed business notepaper as an indication that he was a duly qualified veterinary surgeon.

It was contended on behalf of the respondent that it was not necessary for him to take out any licence under the Revenue Act, 1869, in respect of the said armorial bearings appearing upon his business notepaper ; that he, being a member of the Royal College

armorial bearing, crest or ensign, by whatever name the same shall be called, and whether such armorial bearing, crest, or ensign shall be registered in the College of Arms or not.”

Sect. 27: “Every person who shall . . . wear or use any armorial bearings without having a proper licence under this Act” shall forfeit a penalty.

of Veterinary Surgeons, was entitled to use the armorial bearings thereof as indicating his membership without taking out any licence in respect of such user for such purpose; that he was not "using" the said "armorial bearings" within the meaning of the Act, as he used them only for the purpose of giving notice to the public that he was a duly qualified veterinary surgeon and a member of the college; and that the Act only rendered a licence for armorial bearings necessary when a person used his own armorial bearings.

It was contended on behalf of the appellants that the device on the respondent's business notepaper amounted to "armorial bearings," and were in fact the true armorial bearings of the said college; that, although the college took out a licence in respect of its own user of such armorial bearings as a corporate body, that fact did not justify the use of such armorial bearings by members of the college for their own business or other purposes without proper licences; that the definition in s. 19, sub-s. 13, of the Revenue Act, 1869, included the said armorial bearings; that by reason of the character of the device on the notepaper the respondent must be taken to be "using" within the meaning of the Act the said armorial bearings; and that, as he used them for his own benefit in his own business to indicate his position in the profession of veterinary surgeon, he was "using" such armorial bearings within the meaning of the Act, and that it was not necessary, in order to render a licence necessary under the Act, that the armorial bearings used by a person required to take out a licence should be his own armorial bearings or armorial bearings properly or heraldically so called, but that a person using a device amounting to armorial bearings as defined by the Act was required to take out a licence.

The magistrate was of opinion that the respondent was not liable to take out a licence under the Act to use armorial bearings in the circumstances above set forth; that he was only using the device upon his business notepaper as an indication that he was a veterinary surgeon and a member of the college, and that for a member of the Royal College of Veterinary Surgeons to use the recognized armorial bearings of such a corporation to indicate his membership thereof was not "using" armorial bearings

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within the meaning of the Act; and he accordingly dismissed the information.

The question for the opinion of the Court was whether the magistrate came to a correct determination in law.

A. H. Bodkin, for the appellants. The respondent "used" armorial bearings within the meaning of s. 18 of the Revenue Act, 1869, and the fact that they are the armorial bearings of the Royal College of Veterinary Surgeons, and that he is using them for the purpose of indicating that he is a member of the college and therefore a qualified veterinary surgeon, does not exempt him from the obligation to take out a licence to use them. They are clearly "armorial bearings" within the definition of that expression in s. 19, sub-s. 13, of the Act. The only exemption from the obligation to take out a licence is that contained in s. 19, sub-s. 1, which provides that it shall not be necessary for any person who shall by right of office wear or use the arms or insignia of any "corporation or royal burgh" to take out a licence in respect of such user. The word "corporation" is there used in the same sense in which it is used earlier in the sub-section, as meaning a municipal corporation. That exemption does not apply.

[AVORY J. referred to exemption 3 under the heading "Armorial Bearings" printed on p. 3 of the declaration required to be made by a person taking out a licence. (1)]

There is no express statutory authority for that exemption, but it states the practice of the authorities and is no doubt good in law. The members of a society or club when using the premises of the society or club may be considered to be in the same position as the members of one family, and the licence taken out by the society or club may well cover the use by the members at the premises of the society or club of the notepaper bearing the society's or club's crest. The practice is so stated in *Highmore on Local*

(1) The declaration was not made part of or referred to in the case stated by the magistrate. The exemption ran as follows: "Licences are not required from . . . (3.) any officer or member of a club, or

society, using at the club, or on the business of the society, any armorial bearings for the use of which such club, or society, has taken out a licence."

Taxation Licences, 2nd ed., p. 23. In the same way the use by an undergraduate of the arms of his college while at the college may be covered by the licence taken out by the college. In the present case the user by the respondent of the arms of the college was not while he was at the premises of the college or even upon the college notepaper. He used the arms of the college upon his own business notepaper for his own business purposes. In order to render the taking out of a licence necessary the armorial bearings need not belong to the person using them : *Milligan v. Cowan*. (1) The decision of the magistrate was therefore wrong.

Barrington-Ward, for the respondent. It is admitted that the exemption in s. 19, sub-s. 1, of the Revenue Act, 1869, does not apply. The device, however, is not an armorial bearing within the meaning of the Act. The device or emblem is merely a sign shewing that the respondent is a member of the Royal College of Veterinary Surgeons, and as such is a qualified veterinary surgeon. It is similar to the barber's pole, or the three balls outside a pawnbroker's shop, which are clearly not armorial bearings. It is not like an ordinary crest used upon notepaper.

[LORD ALVERSTONE C.J. The magistrate assumed that the device came within*the definition of "armorial bearings" in s. 19, sub-s. 13, of the Act, but he decided that the respondent had not in the circumstances "used" the armorial bearings. That is the question before us.]

There was no user of the armorial bearings within the meaning of the Act. The test is whether the use of the device is to mark the person using it as an individual, or whether it is to shew that he is one of a particular class of persons, e.g., a society or a club. In the latter case he is not using the device within the meaning of the Act so as to render him liable to take out a licence for that purpose. The respondent merely used the arms of the college to indicate that he was one of the members of the college, and the decision of the magistrate is right.

A. H. Bodkin was not called upon to reply.

LORD ALVERSTONE C.J. In my opinion the magistrate has come to a wrong conclusion. He has held that, inasmuch as

(1) (1896) 23 R. 731 ; 60 J. P. 378.

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the respondent was only using the device upon his business notepaper as an indication that he was a veterinary surgeon and a member of the Royal College of Veterinary Surgeons, he was not using armorial bearings within the meaning of the Revenue Act, 1869. We have before us annexed to the case the respondent's business notepaper with the device thereon, and it is difficult to see how the device is an indication that the respondent is a member of the college, though perhaps it might be so to a person who knows the arms of the college. That, however, would be too narrow a view to take of the case. The respondent has put upon his notepaper, in connection with his own name, armorial bearings, and he uses that notepaper for the purposes of his business. He clearly comes within the words of s. 18 of the Act, "armorial bearings . . . otherwise worn or used." Is there any exemption within which he can bring himself? It is admitted that he cannot bring himself within any statutory exemption. It is said, however, that the Act does not apply to such a case as this, because the respondent merely intended to use the armorial bearings as indicating his membership of the college. There is no such exemption in the Act, nor is there any authority to support such an exemption. It is a clear case of the use of armorial bearings without a proper licence for that purpose. We have been referred to an exemption printed on p. 3 of the declaration required to be made by a person taking out a licence for armorial bearings. That document is not attached to the case and is therefore not before the Court, but as it has been referred to in the course of the argument I have looked at it. The exemption there set out has no statutory authority; it merely seems to indicate the practice of the authorities; and even if it were of statutory force, it has no application to this case, and does not help the respondent. The appeal must therefore be allowed, and the case must be remitted to the magistrate with a direction to convict.

PICKFORD and AVORY JJ. agreed.

Appeal allowed.

Solicitor for appellants: *E. Tanner.*

Solicitor for respondent: *Philip Conway.*

W. F. B.

THE KING *v.* TEMPLER.

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Ex parte HOWARTH.*Dec. 14, 15.*

Employer and Workman — Compensation — Committee representative of Employer and Workmen—Award—Application to review—Notice of Objection to Committee—Jurisdiction of County Court—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I., par. 12; Sched. II., par. 1.

Where a committee, representative of an employer and his workmen, acting under paragraph 1 of the Second Schedule to the Workmen's Compensation Act, 1897, have decided the amount to be paid weekly to a workman as compensation for an accident, and the workman subsequently desires that the weekly payment may be reviewed, and gives due notice that he objects to the committee holding an arbitration with respect to the review, a county court judge has jurisdiction to hear and determine the application to review.

RULE NISI calling upon the deputy judge of the county court of Yorkshire holden at Stokesley and Guisborough and Sir B. Samuelson & Co., Limited, to shew cause why the deputy judge should not proceed to hear and determine an application by William Howarth under the Workmen's Compensation Act, 1897, for an arbitration between the said William Howarth, applicant, and the said Sir B. Samuelson & Co., Limited, respondents, with respect to the review and increase of the weekly payment payable to William Howarth under the Act in respect of personal injury caused to him by accident arising out of and in the course of his employment.

The facts were as follows: On March 22, 1907, the applicant, Howarth, being then a workman in the employment of the respondents, met with an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897 (1), whereby his right hand and part of his right arm were torn off. His average weekly earnings at that date were 24s. The respondents agreed to pay and the applicant agreed to accept by way of

(1) The Workmen's Compensation Act, 1906, did not come into force until July 1, 1907. The provisions of the Act of 1897 upon which the question in the present case turned are re-enacted in similar terms in the Act of 1906.

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compensation, under the Act, for the accident a weekly payment of 12s., and on April 26, 1907, a memorandum of an agreement to this effect was filed in the county court. The respondents subsequently reduced the weekly payments to 8s. 6d. There was in existence a committee representative of the respondents and their workmen with power to settle matters under the Act of 1897 within the meaning of paragraph 1 of Sched. II. of the Act. The applicant objected to the reduction of the weekly payment made by the respondents, and he thereupon applied to the committee to deal with the question of the amount of compensation to which he was entitled. The committee met on December 29, 1909, to consider this question; the parties or their representatives appeared before the committee, and two alternative offers were then made on behalf of the respondents, namely, either that the weekly payment at the rate of 8s. 6d. should continue, or that the applicant should undertake certain light work in the respondents' employment, which they were prepared to offer him, at a weekly wage of 24s. The meeting of the committee was adjourned for these proposals to be considered by the applicant. On February 11, 1910, the committee held another meeting, and, being of opinion that the applicant was capable of doing the work offered by the respondents, they decided that the applicant should accept the respondents' offer of employment at 24s. a week, and the committee further decided that the compensation payable to the applicant should be terminated as from December 31, 1909. Notice of objection to the recording of a memorandum of the decision of the committee was in the first instance given by the applicant to the respondents, but ultimately a memorandum of the terms of the decision of the committee was by agreement, on July 6, 1910, recorded in the county court. On September 2, 1910, the committee met, and, with the consent of both parties, for the purpose of keeping alive the right to compensation, awarded that the sum of 1d. per week should be paid to the applicant as compensation under the Act. A memorandum of this award was recorded in the county court on September 26, 1910.

The applicant continued to work for the respondents down to November 29, 1910, when he left their employment and ceased

to work on the ground that he was as a result of the accident physically incapable of working. On February 7, 1911, the applicant gave notice of an application to the county court judge to review the weekly payment of 1*d.* payable under the award of the committee of September 2, 1910. On February 16 the respondents gave notice to the applicant that a meeting of the committee would be held on February 24, at which his application to review the weekly payment would be dealt with. On February 20 the applicant gave notice in writing to the respondents that he objected to the matter of his application to review being settled by the arbitration of the committee.

The application to review came on for hearing before the deputy county court judge. Objection was taken on behalf of the respondents that the deputy county court judge had no jurisdiction to hear the application, as the committee was the only tribunal which had power to review weekly payments payable under an award of the committee. The deputy county court judge held that he had no jurisdiction to entertain the application. The applicant thereupon obtained this rule nisi.

G. F. Mortimer, for the respondents, shewed cause against the rule. The question whether the deputy county court judge has jurisdiction to deal with this application depends on the meaning of the provisions of paragraph 1 of Sched. II. of the Act of 1897 (which is re-enacted in paragraph 1 of Sched. II. of the Act of 1906) as to arbitration by a committee representative of an employer and his workmen. Paragraph 1 provides that "for settling any matter which under" the Act "is to be settled by arbitration," if there is a committee in existence and neither party objects, "the matter" shall "be settled by the arbitration of such committee." The "matter" there referred to includes not only the settlement of questions relating to an original claim for compensation, but also any questions which may subsequently arise between the parties, such as, in this case, a question whether the weekly payment shall be reviewed; and, therefore, if a committee have once held an arbitration and made an award it is not open to

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either party to object to the committee dealing with any further questions arising out of that award.

The use of the expression "review" in paragraph 12 of Sched. I. in connection with the weekly payments shews that the question of increasing or diminishing the weekly payments was intended to be dealt with by the same tribunal as had awarded payment of compensation in the first instance. This view is supported by the decision in *Mullholland v. Whitehaven Colliery Co.* (1), in which case it was pointed out by Cozens-Hardy M.R. that the county court judge is not a Court of appeal from the committee. *Radcliffe v. Pacific Steam Navigation Co.* (2), which will be relied on by the other side as deciding that an application to review is an entirely fresh "matter," cannot be regarded as an authority on the question of the relative powers of a committee and the county court judge, for in that case all the proceedings had been in the county court. In the circumstances of the present case the applicant was bound to make his application to review before the committee, and the deputy county court judge had, therefore, no jurisdiction to hear the application.

F. B. Merriman, for the applicant, in support of the rule. An application to review an award is itself a "matter" within paragraph 1 of the Second Schedule. It is not an appeal from or a rehearing of the original arbitration, for it raises an entirely new issue, namely, whether there has been such a change in the circumstances since the original award that there is ground for ending, diminishing, or increasing the weekly payment. "The issue on such a review is the same as if it were an original award made at the date of the review": *Radcliffe v. Pacific Steam Navigation Co.*, per Fletcher Moulton L.J. (3) The change in the circumstances may not occur until years after the original award, and the committee may not then be in existence. In *Mullholland v. Whitehaven Colliery Co.* (4) Cozens-Hardy M.R. pointed out that if either party gives notice of objection "the powers of the committee are not invoked and they would not exist with reference to that particular dispute. The matter then goes either to an arbitrator appointed by the parties if they can

(1) [1910] 2 K. B. 278.

(3) [1910] 1 K. B. at p. 690.

(2) [1910] 1 K. B. 685.

(4) [1910] 2 K. B. at p. 285.

agree, or if not it goes to a county court judge." In the same case Buckley L.J. said (1) that "in respect of subsequent matters the county court judge may have jurisdiction." These passages are inconsistent with the contention that, when once a committee has dealt with a claim under the Act, all future disputes between the parties arising out of the same accident must be referred to the arbitration of the committee. The forms issued with the Workmen's Compensation Rules, 1898, support the position taken up by the applicant, for Form 5, which is the form of an application to a county court judge for an arbitration with respect to a review, requires particulars to be given of the "date of agreement, decision, award or certificate fixing weekly payment," and the word "decision" can only refer to the decision of a committee. Rule 31 expressly provides that where an award has been made in any matter by an arbitrator appointed by the judge, any subsequent proceedings by way of arbitration in relation to any matter settled by such award shall be taken before the same arbitrator; but there is no similar provision with regard to subsequent proceedings before a committee.

[LORD ALVERSTONE C.J. This is an application for a mandamus and you must, therefore, deal with the question whether there is not an alternative jurisdiction.]

There is no alternative jurisdiction. If either party objects, the committee has no jurisdiction to act, and in that case, therefore, the county court is the only tribunal which has jurisdiction. But in any case, there being no right of appeal from a decision of a committee, and the committee having no power to summon witnesses, a committee is not so convenient a tribunal as the county court.

LORD ALVERSTONE C.J. This case, which has been very well argued on both sides, raises what is to my mind an extremely difficult question, but I have come to the conclusion, though not without very considerable doubt, that the contention put forward on behalf of the workman is right, and that the rule ought to be made absolute.

The question depends upon the jurisdiction of a committee,

(1) [1910] 2 K. B. at p. 290.

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representative of an employer and his workmen, acting under paragraph 1 of Sched. II. of the Workmen's Compensation Act, 1897. That schedule contains provisions "for settling any matter which under this Act is to be settled by arbitration," and by paragraph 1 of the schedule, if a committee exists "with power to settle matters under this Act," "the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee." The question, in substance, which we have to decide is, what is "the matter" which is to be referred to the arbitration of the committee. On the one hand it is said that the matter is not only the original claim of the workman for compensation, but also all subsequent applications arising out of that claim or out of the award made on the claim. If that is the right view, then it is, I think, clear that the particular application which the workman desires to make in this case is one which ought to be dealt with by the committee, and not by the county court judge. On the other hand it is said that "the matter" referred to in paragraph 1 of the schedule is the particular question which is at any time in dispute between the parties, whether it be an original claim for compensation or a subsequent application to increase or diminish or terminate the weekly payment, and that although a party may have consented to the original claim being dealt with by the committee, he is not bound to consent to a subsequent dispute, which may arise a considerable time afterwards, being so dealt with. In the present case the committee did in February, 1910, hold an arbitration and make an award. Subsequently the workman was desirous of having the weekly payment reviewed with a view to its being increased; he gave due notice of objection to that question being dealt with by the committee, and the question is whether, having consented in the first instance to his claim for compensation being dealt with by the committee, he is now entitled to have the question of the review of the weekly payment dealt with by the county court judge. The right to a review is given by paragraph 12 of Sched. I., which provides that "any weekly payment may be reviewed at the request

either of the employer or of the workman, and on such review may be ended, diminished or increased . . . and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." Prima facie I should have thought that when the section says that a weekly payment may be "reviewed" it means that the review is to be by the tribunal which originally fixed the amount of the weekly payment; but, for reasons which I will state, it is possible, I think, to put another construction upon the language of paragraph 12, namely, that the question of the amount of the weekly payment is to be reconsidered under fresh circumstances; and, if so, the strength of any argument based on the word review is to that extent diminished. The arbitration contemplated by paragraph 12 of Sched. I. is an arbitration by a committee under paragraph 1 of Sched. II., which I have already referred to, or under paragraph 2 by an arbitrator or a county court judge. Then paragraph 8 of Sched. II. provides that: "Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register." It is to be observed that under the Act of 1906 express power is given by paragraph 9 (d) of Sched. II. of that Act to the registrar of the county court in certain cases and for certain reasons to refuse to register the memorandum of an agreement relating to compensation; but it would seem from the decision to which I am about to refer that in the case of an award of a committee the powers of the registrar or county court judge with regard to registering the memorandum under paragraph 8 of Sched. II. of the Act of 1897 are strictly limited

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1911 to considering the question specified in paragraph 8, namely, the genuineness of the award. The question of the relative powers of a committee and the county court judge was considered in *Mullholland v. Whitehaven Colliery Co.* (1) In that case a committee had awarded a lump sum of 100*l.* in settlement of a claim for compensation. The county court judge refused to register the memorandum of the award on the grounds that the workman was a minor and that the committee was not validly constituted, and that there was no power in the circumstances to award a lump sum in compensation. Cozens-Hardy M.R. in giving judgment dealt with the respective powers of a committee and of the county court judge. He said: "A committee of this kind is recognized by the Legislature; it is recognized in the schedule of the Act as an extremely important body, and I should regret if there was any foundation for the view that a committee of this kind, conducting an arbitration under this Act, ought not to be treated in any matter falling within the Act as entitled to the utmost respect and regard. The county court judge is not a Court of appeal from the committee. He has no jurisdiction of that kind at all. He is not entitled to treat an award of the committee as though it was simply an agreement between the workman and his employers which he might review under paragraph 9 (*d*) of the Second Schedule. It is something far more important than that; it is really an award binding upon both parties which ought to be recorded under paragraph 9 subject to the conditions therein mentioned, but with which the county court judge or the official recording has no power to interfere. Of such importance is the committee in the view of the Legislature that when a committee of this kind, namely a committee representative of an employer and his workman, exists, with power to settle matters under the Act, that is the body to which for the purpose of settling any matter which under the Act is to be settled by arbitration the parties are to go without anything more being done. They are to go there subject to this, that either party may by notice in writing, before the committee meet to consider the matter, object, and if that notice is given within that time,

(1) [1910] 2 K. B. 278.

then the powers of the committee are not invoked and they would not exist with reference to that particular dispute." Buckley L.J. pointed out that the "committee is the tribunal to decide the matter to the exclusion of the county court and of everybody else," and Kennedy L.J. used language to the same effect. Those judgments appear to me to support the view that the committee is a body specially recognized by the Legislature as discharging important duties, and one which *prima facie* would seem to be the tribunal to deal with the present application, though it is true that the question which we have to determine was not the question then before the Court.

The question which arises in this case is whether the application by the workman to review the weekly payment is part of the original "matter" which came before the committee, or whether it is an entirely fresh "matter" arising under different circumstances, and, therefore, a matter which cannot be dealt with by the committee if either party gives notice of objection. [The Lord Chief Justice briefly recapitulated the facts, and continued:] In the view which I take of the facts I should have thought that this application to review was eminently a question which ought to be dealt with by the committee who have already dealt with questions between the workman and his employers arising out of this accident; but I am much pressed with the argument that jurisdiction to review an award only exists when there has been a change of circumstances. That was established by the decision in *Radcliffe v. Pacific Steam Navigation Co.* (1), where it was contended that a decision of the county court judge on a certain date that the weekly payments ought to be reduced caused the question of the workman's capacity for work to become *res judicata*, and therefore a question which could not be reopened at a later date on an application by the workman for an increase in the weekly payment; but the Court of Appeal held that the doctrine of *res judicata* had no application to a decision as to the amount of the weekly payment, which could always be the subject of review on proof of some change in the circumstances; and it may, of course, be some years before a change of circumstances occurs. I am of opinion,

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(1) [1910] 1 K. B. 685

1911 <hr/> REX v. TEMPLER. HOWARTH, <i>Ex parte.</i> <hr/> Lord Alverstone C.J.	therefore, that, when either party to an award wishes to have a review of the weekly payment, that cannot be regarded as an application in the original matter which came before the tribunal in the first instance, whether it was a committee, an arbitrator, or a county court judge, but it may be treated as a new matter, and one which, if either party objects, cannot be settled by the arbitration of a committee under paragraph 1 of Sched. II., but which must be dealt with under paragraph 2 by either an arbitrator or a county court judge. I am not much pressed with the argument founded upon the possibility of the committee having ceased to exist before the application to review is made, for the committee in this case is still in existence. I ought to say one word with regard to the argument that, this being an application for a mandamus, the rule ought not to be made absolute because there is an alternative remedy, namely, arbitration by the committee. But if I am right in the view I take that the committee have no jurisdiction to act if either party objects, the alternative remedy either does not exist in law, or may be said to be so doubtful that we ought not on that ground to refuse to make the rule absolute. Notice of objection to the committee having been given in due time by the workman, the county court judge, in my opinion, had jurisdiction to entertain, and should have entertained, this application. The rule must, therefore, be made absolute.
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HAMILTON J. I am of the same opinion. Speaking for myself, the language of Sched. II. of the Act of 1897 presents some difficulty, and I do not derive much assistance from the passages quoted from the judgments in *Radcliffe's Case* (1) and *Mullholland's Case* (2), which were not cases determining this particular point; still less can I get assistance from the forms the use of which is recommended but not enjoined. But it appears to me that some assistance may be gained by considering what was the subject-matter of the Workmen's Compensation Act, 1897. The Act gave to an injured workman, independently of negligence on the part of the employer or his servants, a right to compensation for certain personal injuries,

(1) [1910] 1 K. B. 685.

(2) [1910] 2 K. B. 278.

in other words a statutory cause of action. But for special provisions in the Act, two things would have applied to that cause of action : first, the compensation would have been recoverable once and for all ; and, secondly, the claim would have been cognizable only by a Court of law, either a common law Court, or a Court of statutory jurisdiction. The Act, however, dealt specifically with both these matters. It provided that the compensation was to take the form, in default of agreement, of weekly payments, and although after the expiration of not less than six months these weekly payments could be redeemed by the payment of a lump sum, that again, in the absence of agreement, was not to be at the will of either party, but upon the determination of a tribunal. Consequently, the scheme of the Act was to provide rules within which upon a change of circumstances there might be a change in the measure of the compensation. Further, the Act provided not only for determination of these disputes by Courts of law, but, under paragraph 1 of the Second Schedule, for their determination by a non-legal body, a committee representative of the employer and his workmen, and it was decided in *Mullholland's Case* (1) in the Court of Appeal that to give that body jurisdiction it is not necessary that the individual workman, or, I presume, the other party to the dispute either, should have given his personal submission, as would be necessary to an arbitration at common law, but the mere existence of such a committee may compel the parties to submit to it as the tribunal by which *prima facie* the dispute is to be settled. It is I think to be presumed from these considerations that the Legislature did not intend a lay tribunal of that character, to which the litigants had not made their personal submission, to be the exclusive tribunal, except upon the assumption that there was a continuance of the consent of the parties before it to be bound by its determination. Obviously it would be impracticable and unjust to allow either party to interpose an objection while the determination of a particular question was actually pending, because that would give an opportunity of nullifying all that had occurred, according as the litigant thought that the case was

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going for or against him ; but, conditionally upon the right of objection being barred after the commencement of the consideration of a particular dispute, one would presume that the Legislature intended that the objection might be renewed or interposed at any time prior to the commencement of a particular determination, and one would expect to find that in the case of this lay tribunal it should be made a consensual tribunal, so far at least, that at every separate stage in the litigation there should be an opportunity to both parties to interpose his objection, which would have the result of giving the right to have the particular question then in dispute determined either by a Court of law or by the other machinery provided under the Act. I think the Second Schedule, read in the light of these considerations, warrants the construction that either party can object to the submission of any fresh issue to this tribunal at any time before the committee meet to consider that fresh issue. The limit of time clearly extends to the time when the committee meet. How early the objection might be taken we have not to decide ; whether an objection could be taken, so to speak in the air, before any issue had arisen, or whether a valid notification could be given that the workman or the employer did not propose to go before the committee any more in that particular case. Here the objection was taken after a proposal that the committee should deal with the matter and before the committee met. The expression used in s. 1, sub-s. 3, of the Act is " If any question arises in any proceedings under this Act," and it appears to me that " proceedings under this Act " is a wider term than " any question " arising therein. " Proceedings under this Act " rather suggests the general history of disputes between a particular workman and his employer. " Any question arising therein " suggests a series of stages or of issues which may or may not arise from time to time. The words of the Second Schedule are quite general, " for the purpose of settling any matter which under this Act is to be settled by arbitration." The word " matter " alone might, no doubt, be apt either to cover the whole proceedings or the separate stages or issues arising in the proceedings, but there is no analogy here to cases in which the whole legal proceedings are described as " in the matter of " this or that.

There is no action commenced to invoke the administrative jurisdiction of a Court; there is no question of persons under the guardianship of a Court or of a fund or property in the custody of a Court; and, therefore, the term "matter" must be taken to have been used in the general and not in the technical sense.

It appears to me that the expression "settling any matter which under this Act is to be settled by arbitration" is, to say the least of it, equally consistent with either contention, but that the scheme of the Act is to regard the separate stages at which disputes may arise, either originally when litigation is substituted for previous agreement, or by way of review, as being in themselves separate matters, the subject of determination in the manner provided, and if that is so, each party, by objecting before the committee meet to consider the matter, can terminate the jurisdiction of the committee, and can claim to be remitted in all his rights to the other tribunals provided.

The result, therefore, is that the rule must be made absolute.

BANKES J. I agree. It is quite ordinary practice for proceedings in a Court of law to be kept alive for the purpose of enabling the parties to apply from time to time in the proceedings to have any question which arises between them adjusted. It would have been easy to have provided in the Workmen's Compensation Act, or in the Rules, that what is called a review of any weekly payments should be made by way of application to the particular tribunal that had originally seisin of the matter. But no such language is used in connection with the reviewing of a weekly payment. The scheme of the Act is that when a workman is either totally or partially incapacitated for work as the result of an accident he should receive during the period of incapacity, after the second week, a certain weekly payment, and, of course, that weekly payment may require to be altered or adjusted from time to time, and the adjustment or alteration would depend in the one case on whether he had got better or in the other case on whether had got worse, and this might require to be done from time to time as long as the workman continued to receive any weekly payments. That

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process is spoken of in the Act as the review of the weekly payment, and the right to demand such a review is given to either party. Nothing is specially said as to when such an application is to be made, and in my opinion the scheme of the Act is that each application for a review is an entirely new and fresh proceeding. It may be that in any such proceeding the parties are estopped to some extent from raising certain issues by reason of what has taken place in the previous proceedings between them either for the purpose of assessing the original compensation or of varying it from time to time, but, however that may be, in my opinion each application for a review is an entirely new and independent proceeding, and I can find no direction as to the tribunal to which any such application is to be made except in that part of the Act which deals generally with all applications, including an original application, and if that is the correct view of the Act it follows that in this particular case, the workman having excluded the committee as a possible tribunal by reason of his objection, there is no other tribunal to which this application can be made except the county court judge, and on these grounds I am of opinion that the county court judge was wrong in holding that he had no jurisdiction in this case.

Rule absolute.

Solicitors for applicant : *Indermaur & Brown, for Callis, Blackpool.*

Solicitors for respondents : *Van Sandau & Co., for T. M. Barron & Smith, Darlington, and for Belk, Cochrane & Belk, Middlesbrough.*

F. O. R.

THE KING v. ALLEN.

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Justices—Power to state a Special Case—Order for Payment of Costs—Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 6, sub-s. 3.

Where a charge made against a person for an indictable offence (not dealt with summarily) is dismissed by the examining justices, and the justices under the powers conferred by s. 6, sub-s. 3, of the Costs in Criminal Cases Act, 1908, make an order for the payment of the costs of the defence by the prosecutor, the justices have power to state a case on the question whether their order was rightly made.

RULE NISI to justices to shew cause why they should not state a case for the opinion of the Court.

Two police officers were charged before two justices with having committed perjury when giving evidence on the hearing of a summons against the licensee of certain licensed premises for an offence under the Licensing Acts. The justices dismissed the summonses for perjury, and being of opinion that the charge of perjury had not been made in good faith, they ordered the prosecutor, the licensee, under s. 6, sub-s. 3, of the Costs in Criminal Cases Act, 1908 (1), to pay 5*l.* 5*s.*, the costs of the defence. The justices declined to state a case on the question whether the order to pay costs was rightly made.

F. B. Merriman, for the justices, shewed cause against the rule. Sect. 33 of the Summary Jurisdiction Act, 1879, only empowers justices to state a case when they are acting as a Court of summary jurisdiction: *Boulter v. Kent Justices*. (2) The justices were dealing with this case, not as a Court of summary jurisdiction, but as examining justices; and in s. 1, sub-s. 1 (*b*) and (*c*), of the Costs

(1) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 6, sub-s. 3: "Where a charge made against any person for any indictable offence (not dealt with summarily) is dismissed by the examining justices, the justices may, if they are of opinion that the charge was not made in good faith, order the prose-

cutor to pay the whole or any part of the costs incurred in or about the defence, but if the amount ordered to be paid exceeds twenty-five pounds the prosecutor may appeal against the order to a Court of quarter sessions in manner provided by the Summary Jurisdiction Acts, . . ."

(2) [1897] A. C. 556, at p. 571.

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in Criminal Cases Act, 1908, a distinction is expressly drawn between a Court of summary jurisdiction and examining justices. In *Foss v. Best* (1) Channell J. said that he thought that "justices who are taking depositions for the purpose of committing a prisoner for trial have not this power to state a case, as they are not exercising summary jurisdiction." That passage correctly states the law and is exactly in point in the present case. In *Hagmaier v. Willesden Overseers* (2) it was held that justices sitting at special petty sessions for the purpose of reviewing the jury lists are not a Court of summary jurisdiction.

Gordon Hewart, for the prosecutor, in support of the rule. There is no authority for saying that the justices cannot in the circumstances of this case be ordered to state a case. The ratio decidendi of *Boulter v. Kent Justices* (3) and also of *Rex v. Howard* (4) was that justices in licensing meeting are in no sense of the word a Court of justice, but justices when exercising their power of ordering a party to pay costs under s. 6, sub-s. 3, of the Act of 1908 are clearly acting judicially, for they have to decide on the evidence before them whether the charge has been made in good faith. By s. 13, sub-s. 11, of the Interpretation Act, 1889, the expression "Court of summary jurisdiction" means any justices to whom jurisdiction is given by the Summary Jurisdiction Acts "or any other Act." Therefore, although when taking the evidence on the charge of perjury the justices may have been acting as examining justices, when the charge had been dismissed, and they were adjudicating upon the question of costs under the Act of 1908, they were acting as a Court of summary jurisdiction, and consequently had power to state a case.

LORD ALVERSTONE C.J. said that the Court would hear the case on the merits before giving judgment on the preliminary point.

The question raised was entirely one of fact, namely, whether there was any evidence on which the justices could find that the charge of perjury was not made bona fide; it is, therefore,

(1) [1906] 2 K. B. 105, at p. 110.

(2) [1904] 2 K. B. 316.

(3) [1897] A. C. 556.

(4) [1902] 2 K. B. 363.

unnecessary to set out the facts and arguments relating to this question.]

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LORD ALVERSTONE C.J. In this case, a charge of perjury having been made against two policemen, the justices dismissed the charge, and being of opinion that the charge had not been made bona fide, they exercised the powers conferred upon them by s. 6, sub-s. 3, of the Costs in Criminal Cases Act, 1908, and ordered the prosecutor to pay five guineas towards the costs incurred by the defence. The point which we have to decide is whether the justices have power to state a case for the opinion of this Court on the question whether that order for the payment of costs was rightly made in law. It is to be observed that as the order was for the payment of a less sum than 25*l.* the order is final, whereas if it had exceeded 25*l.* there would under the section have been a right of appeal to quarter sessions "in manner provided by the Summary Jurisdiction Acts." That provision is to some extent a recognition that justices, when dealing with an indictable offence which cannot be dealt with summarily, are nevertheless in the matter of ordering costs acting as a Court of summary jurisdiction, and it is of course not denied that if they are acting as a Court of summary jurisdiction they have power to state a case. It has, however, been contended on behalf of the prosecutor that the justices in making this order were not acting as a Court of summary jurisdiction, but as examining justices only, and that they therefore cannot be ordered to state a case. In support of this contention reliance was placed on the language of s. 1 of the Act of 1908, which enables certain Courts to order the costs of the prosecution or defence to be paid out of certain funds; and sub-s. 1 (c) of that section says that one of the "Courts" which may make an order under that section is "any justice or justices before whom a charge not dealt with summarily is made against any person for an indictable offence (in this Act referred to as the examining justices)." In my opinion that section does not afford much assistance in determining the question which we have to decide under s. 6, except that it recognizes that justices when dealing with the question of costs in the case of an indictable

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offence which is not to be dealt with summarily are a "Court." The words "examining justices" appear to have been inserted for the purpose of definition; and I do not think it necessarily follows from the use of those words in s. 6, sub-s. 3, that examining justices when making an order for the payment of costs are not a Court of summary jurisdiction. Before justices can make an order under s. 6, sub-s. 3, for the payment of the costs of the defence by the prosecutor, they have to be satisfied that the charge was not made in good faith. For the purpose of deciding that question the justices are undoubtedly a Court, and they are bound to act judicially and to weigh the evidence; and, having regard to the definition of a Court of summary jurisdiction in s. 13, sub-s. 11, of the Interpretation Act, 1889, I am of opinion that the justices in this case had power to state a case. Reliance was also placed upon a passage from the judgment of Channell J. in *Foss v. Best*. (1) Taken by itself that passage might seem to be opposed to the view which I have expressed, but it must be remembered that in *Foss v. Best* (1) there was no question of an order for the payment of costs by one party; the observations of Channell J. were directed solely to the position of justices when taking depositions for the purpose of committing a prisoner for trial, and, therefore, have no application to the question which arises in this case, namely, as to the position of justices when making an order for the payment of costs under s. 6, sub-s. 3, of the Act of 1908.

The Lord Chief Justice then dealt with the facts of the case and held that there was evidence on which the justices could find that the charge was not made in good faith.

HAMILTON J. I am of the same opinion. I think it is clear that the justices when making this order for the payment of costs were acting as a Court, and having regard to the language of s. 33 of the Summary Jurisdiction Act, 1879, as extended by s. 13, sub-s. 11, of the Interpretation Act, 1889, I think there is power to order the justices to state a case, unless it can be said that s. 1 of the Act of 1908 takes away that power. It is true that in s. 1 justices, when exercising their functions with

(1) [1906] 2 K. B. 105.

regard to prisoners indicted for felony who are not to be dealt with summarily, are for the purpose of that section placed in a different category from a Court of summary jurisdiction, but in my opinion s. 1 was not intended to modify, and does not modify, the effect of s. 33 of the Act of 1879 upon s. 6, sub-s. 3, of the Act of 1908.

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BANKES J. I entirely agree and have nothing to add.

Rule discharged.

Solicitors: *Snow, Fox & Higginson, for Harcourt E. Clare, Preston, Lancs.; Nicol, Son & Jones, for C. H. Pickstone, Radcliffe, Lancs.*

F. O. R.

[IN THE COURT OF APPEAL.]

BRITISH ASSOCIATION OF GLASS BOTTLE MANUFACTURERS, LIMITED *v.* NETTLEFOLD.

C. A.
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 Dec. 16.
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Practice—Discovery—Affidavit of Documents—Further Affidavit—Rules of the Supreme Court, Order XXXI., rr. 12, 19A.

An admission by a party required to make an affidavit of documents that he has in his possession or power other documents relevant to the matters in issue, wherever the admission is found and in whatever shape it is made, may be a ground for requiring a further and better affidavit.

Jones v. Monte Video Gas Co. (1880) 5 Q. B. D. 556, explained.

The powers conferred upon the Court by Order XXXI., r. 19A, with reference to the discovery of a specified document do not limit the power of the Court to make an order in general terms for a further and better affidavit and, where the Court comes to the conclusion that the document in question necessarily involves the existence of other documents not included in the original affidavit, it will make an order in that form.

Kent Coal Concessions, Ltd. v. Duguid [1910] A. C. 452, applied.

APPEAL from the refusal of Bucknill J. in chambers to order the plaintiff company to file a further and better affidavit of documents.

The action was brought by the plaintiff company against the

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C. A. defendant, who was the holder of 9690 shares in the company,
1911 to enforce a call of 2s. 6d. per share.

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The defendant by his defence alleged that the plaintiff company was a combination for regulating the relations between masters and masters and for imposing restrictive conditions on the conduct of the trade and business of manufacturing glass bottles and was a trade union within the meaning of s. 16 of the Trade Union Act Amendment Act, 1876 ; that the registration of the plaintiff company as a company under the Companies Acts was void under s. 5 of the Trade Union Act, 1871 ; and that the plaintiffs were not entitled to sue as a registered company. Alternatively he alleged that the plaintiff company was an illegal combination at common law in that its main object was the unreasonable restraint of trade by arbitrarily restricting output and fixing prices, and that any agreement to pay the call was unenforceable at common law.

By his particulars the defendant alleged, in effect, that the illegal object of restraining trade by restricting output and prices was to be carried out (inter alia) by an agreement made with an international association of glass bottle manufacturers formed for similar purposes in restraint of trade and commonly known as the Europäische Verband ; that, as the defendant believed, a written agreement was in fact made between the plaintiff company and the Verband to regulate the relations between them and their dealing with a patent known as Owen's patent which the parties desired to acquire and use for the purpose of thereby controlling output and prices ; that, as the defendant believed, the plaintiffs granted written licences to certain persons to use the Owen's patent machine, the said licences containing clauses intended to secure the restricting of output and prices, but that he was unable until after discovery and interrogatories to give particulars of the licences.

The secretary of the plaintiff company filed an affidavit of documents which included an undated form of licence to use Owen's machine, and by their answers to interrogatories the plaintiffs admitted that they had issued licences to use Owen's patent to various persons. The affidavit of documents contained no mention of any agreement between the plaintiffs and the

Europäische Verband ; but by a letter written by the plaintiffs' solicitors to the defendant's solicitors at the same time as the filing of the affidavit they admitted that they had in their possession the agreement in question, but denied its relevance. The defendant thereupon applied for production of the agreement. Scrutton J., reversing the order of the Master, refused the application, but the order of the learned judge was reversed by the Court of Appeal, who made an order for production. The defendant's solicitors then wrote to the plaintiffs' solicitors suggesting that the latter should produce all the documents covered by the decision of the Court of Appeal, and referring particularly (inter alia) to the licences issued by the plaintiff company, to the correspondence relating to proposed licences, to all agreements fixing the amount of output or prices, and to the drafts of the agreement already produced and correspondence relating thereto, and that the plaintiffs should file a further affidavit of discovery.

On the refusal of the plaintiffs to accede to this request the defendant applied for an order for a further and better affidavit. Bucknill J., affirming the Master, refused the application.

The defendant appealed.

Chaytor, for the appellant. An admission by a party from whom discovery is sought that he has in his possession or power material documents not included in his affidavit of documents is a ground for ordering a further affidavit. Bucknill J. thought himself bound by *Jones v. Monte Video Gas Co.* (1) to refuse the appellant's application for a further and better affidavit by reason of the fact that the admission of the respondents was not contained in the pleadings ; but it is not necessary that the admission should be found in any particular document. In *Attorney-General v. Emerson* (2) Brett L.J., who was a party to the decision in *Jones v. Monte Video Gas Co.* (1), says that the Court may come to the conclusion that there are other documents in the possession or power of the party making the affidavit from the description of the documents given by him "and from other admissions and documents produced to the Court." In

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(1) 5 Q. B. D. 556.

(2) (1882) 10 Q. B. D. 191.

C. A. 1911 *Wright v. Pitt* (1) Wood L.J., in stating the practice of the old Court of Chancery, says that "it must be shewn that the party has made some admission throwing discredit on the sufficiency of his affidavit." These words are perfectly general and are not limited to admissions in the pleadings. In *Morris v. Edwards* (2) Lindley L.J. says: "It may be that, if the Court can see from the affidavit of documents, or from the description of the documents therein, or from any other affidavit or pleading of the party from whom the discovery is sought, that the affidavit of documents is insufficient, these would be legitimate sources from which the Court may arrive at the conclusion that a further affidavit ought to be made." Again, in *Lyell v. Kennedy* (3) Cotton L.J., who was also a party to the decision in *Jones v. Monte Video Gas Co.* (4), treats admissions wherever found as the basis of an application for a further and better affidavit, and quotes with approval the language of Turner L.J. in *Noel v. Noel*. (5) In this case the respondents admitted that they had in their possession the agreement with the German company, while denying its relevancy, but the adjudication of the Court that the document was relevant has the same force as an admission. If there is an admission by the party making the affidavit that he has in his possession or power a specific document material to the issue, and that document involves the existence of other documents, as it is shewn that this agreement does, the special provisions in Order xxxi., r. 19A, with reference to the discovery of that particular document do not affect the general power of the Court to order a further and better affidavit of documents: *Kent Coal Concessions, Ltd. v. Duguid*. (6)

Alexander Neilson, for the respondents. The practice is correctly stated in *Jones v. Monte Video Gas Co.* (4), namely, that an affidavit of documents is conclusive against the party seeking discovery unless it can be shewn, either from the affidavit itself, or from the documents therein referred to, or from an admission

(1) (1868) L. R. 3 Ch. 809.

(2) (1889) 23 Q. B. D. 287.

(3) (1884) 27 Ch. D. 1.

(4) 5 Q. B. D. 556.

(5) (1863) 1 D. J. & S. 468.

(6) [1910] 1 K. B. 904; affirmed [1910] A. C. 452.

in the pleadings of the party swearing the affidavit, that there are in his possession or power other documents material and relevant to the action. The utmost that the appellant can claim here by way of discovery is a formal affidavit as to the particular document in question. He has obtained the production of that document under Order xxxi., r. 19A, but that does not entitle him to a further affidavit in general terms. The document does not in terms refer to other documents, and there is nothing on the face of the document itself to shew that there must be other documents behind. It is submitted that the provisions of r. 19A are a qualification of the general right of discovery. *Kent Coal Concessions, Ltd. v. Duguid* (1) is distinguishable because a balance-sheet necessarily connotes books and so on. This document is not analogous. [He referred also to *White v. Spafford & Co.* (2) and *Huntley Brothers v. Owners of Backworth Collieries.* (3)]

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COZENS-HARDY M.R. This is an appeal from a decision of the judge in chambers and it asks that the plaintiffs may be ordered to file a further affidavit of documents. Speaking very generally, this is an action in which two issues are raised: first, whether the plaintiff company was an illegal company because of its being a trade union within the definition of the Act; secondly, whether it is a company of an illegal character in that it seeks to impose unreasonable restraints on trade. In substance that is the case which is raised. The plaintiff company was required to make and did make an affidavit of documents. In good faith, I will assume,—and I have no reason to doubt it—the plaintiffs did not include a certain class of documents. I will explain in a minute what I mean by a certain class of documents. At the same time the plaintiffs informed the defendant that they had in their possession one particular document which they did not consider to be relevant. An application was then made under Order xxxi., r. 19A, for production and inspection of that specified document, and it was argued on the footing that there had been an affidavit stating

(1) [1910] A. C. 452.

(2) [1901] 2 K. B. 241.

(3) [1911] W. N. 34.

C. A. that fact. That came before the Court of Appeal. The Court
 1911 of Appeal, after looking at the document, held adversely to
 the plaintiffs that it was a document material to the matters
 in question in the action and made an order for its production.
 I have not seen the document. I am told it is very voluminous,
 but it was, I gather, a contract between the plaintiff company
 and a German company called the Europäische Verband. It has
 also been sworn by the plaintiffs in answer to interrogatories
 that they have granted licences to various persons in England,
 and they specify the dates of some at all events of the licences
 and say that the defendant has seen the form of those licences,
 but nowhere do they refer to or condescend to particulars of any
 of the contracts in pursuance of which the licences were granted,
 nor to any of the correspondence leading up to them. Now the
 inference to my mind is that there must be documents leading
 up to the documents which they have produced which are equally
 relevant with those which they have produced. On this
 point the case seems to me to be indistinguishable from the case
 of *Kent Coal Concessions, Ltd. v. Duguid* (1), where the inclusion
 by a company of its balance-sheet referring to nothing else was
 held to justify a further affidavit of documents on the ground
 that the inference was irresistible that the company must have
 books and so on shewing the particulars from which the items
 in the balance-sheet were taken. I think therefore that, unless
 the point which was made by the plaintiffs' counsel in chambers,
 and on which the learned judge decided, is a good point, namely,
 that no admission is of any use unless it is found in the affidavit
 of documents itself or unless the document is referred to in the
 pleadings—unless that objection is valid—it seems to me that
 the present application ought to be granted. How does the
 matter stand? The old Court of Chancery would not allow
 cross-examination upon an affidavit of documents. It would not
 allow contentious disputes as to what documents were or might
 be in the possession of the other side; but, when once you have
 got an admission by the person making the affidavit that there are
 documents which have not been included in the affidavit, it seems
 to me to be extremely unimportant to consider whether that

(1) [1910] A. C. 452.

admission is found in the affidavit of documents itself or in another affidavit made in the process of litigation, or in a letter written by the opposite party, or in any other shape whatever. But it is said that in *Jones v. Monte Video Gas Co.* (1) the language of the Court, and particularly the language of Lord Esher, tended to cut that down and to shew that the admission to be of any value must be found in the particular affidavit itself. But the same learned judge in the subsequent case of *Attorney-General v. Emerson* (2) says this: "But if, on the other hand, the Court has that degree of certainty that the defendant has in that sense misconceived the nature of the documents, then the Court is entitled not to act upon the affidavit." That is to say the affidavit stating that certain documents alone related to the matters in question in the action. "But from what is the Court to get this certainty? Where the proceeding was that of the old Court of Chancery, I suppose it was from the answer; but where it is the new process, that is, where it is only by interrogatories, summons, and affidavits, it seems to me that that certainty must be got from the description of the documents given by the defendant and from other admissions and documents produced to the Court." Speaking from my own individual experience, I am satisfied that the Court has acted upon the view that any admission by the person required to make an affidavit may be ground for requiring a further affidavit in whatever shape that admission may be found, and of course an adjudication by the Court of materiality cannot be of less value than an admission by the party himself. I do not wish to be misunderstood in one respect. If the matter had simply rested upon the one document which has been produced for inspection pursuant to the application under Order xxxi., r. 19A, I should not have thought that it was at all a case for a further affidavit of documents. The opposite party has got the inspection and why should he want anything more? The mere suspicion, the mere fact that one document was omitted, would not probably be a ground for requiring a further affidavit, there being no reason, I repeat, to charge want of good faith on the other side. But to my mind the inference here is absolutely irresistible that there is a class

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(1) 5 Q. B. D. 556.

(2) 10 Q. B. D. 191, 204.

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of documents which originally has been excluded from the affidavit on the ground, held in good faith, that the documents were not relevant or material to any issue in the cause. The Court of Appeal has decided that documents of that class are material, or rather that one document of that class is material. That being so, it seems to me to follow irresistibly that the defendant here is entitled to a further affidavit from the plaintiffs swearing what if any documents they have of that class which were not included in the original affidavit. In other words, we cannot limit the order to the particular document which the Court has seen, but it must go in the general form, and whoever makes the affidavit on the part of the plaintiff company must pledge his oath, now that he has been enlightened by the view of the Court of Appeal, as to what documents he now has or ever has had in his possession relating to the matters in question in this action.

In my view the appeal must be allowed, the costs here and below to be the appellant's in any event.

FARWELL L.J. I am of the same opinion. As the learned judge seems to have taken a view which would very much narrow the jurisdiction and powers of the Court, I will add a few words. In my opinion the gist of Cotton L.J.'s judgment in *Jones v. Monte Video Gas Co.* (1) is contained in this passage: "The object of this practice was to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient." The Court of Chancery always set its face against having any dispute as to the truth of an affidavit of documents. Then, as it was found that this rule worked a hardship, r. 19A of Order xxxi. was added, and that was certainly an invasion of the strictness of the rule laid down in *Jones v. Monte Video Gas Co.* (1), because it enabled a person dissatisfied with the affidavit of documents, by way of suggestion of a specific document and his belief that the deponent had it, to compel that deponent to make a further affidavit. That is limited to a specific document which can be specifically described. The rule itself is, as I said in *Kent Coal Concessions, Ltd. v. Duguid* (2), not a modification but an

(1) 5 Q. B. D. 556.

(2) [1910] 1 K. B. 904, 915.

enlargement of the general right of discovery. Production of such specific document could not have been obtained without r. 19A. Then when such document is admitted to be relevant by virtue of the order of the Court, as is the case here, such document must be treated as included in the original affidavit of documents made by the deponent. The next question is, Is there any ground from the contents of that document, which has thus become part of the affidavit of documents, for saying that something further is obviously omitted? In my opinion there clearly is; it was decided by this Court in *Kent Coal Concessions, Ltd. v. Duguid* (1), which was affirmed in the House of Lords, that it is allowable for the Court to draw inferences and to say, as in that case, "Here is a balance-sheet; a balance-sheet necessarily implies the existence of books of account from which that balance-sheet was made up; those books, so far as they were used to make up that balance-sheet, are relevant because the balance-sheet is admitted to be relevant, and therefore they must be produced."

In this case a lengthy document has been produced relating to licences and the general matters which are in dispute in this action, namely, whether or not the company is formed for the purpose of unduly restraining trade and therefore illegal. All these matters are obviously dealt with by other documents referred to in the document which has now been held to be relevant. It seems to me to follow that those documents are also relevant. I do not understand Cotton L.J. to have intended to state that there are no other instances than those he gives in which a further affidavit may be required, but merely to give as instances the most ordinary ones. To say, for example, that the deponent might write a letter saying that there was another relevant document in his possession, but that such letter could not be relied upon as a reason why a further affidavit should be ordered, seems to me to be extravagant. The whole point of the rule is this: There must not be a conflict of affidavits as to the truth of an affidavit of documents; but if you can get an admission there is no question of conflict; you have the truth out of the

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(1) [1910] 1 K. B. 904; [1910] A. C. 452.

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Appeal allowed.

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Solicitors for appellant: *Coward & Hawksley, Sons & Chance.*
Solicitors for respondents: *Crowders, Vizard, Oldham & Co.*

H. B. H.

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CROUCH v. CROUCH.

Deed—Construction—Ambiguous Covenant controlled by Recital.

By a deed of separation, after reciting an agreement by the husband to make a payment of 5s. a week to the wife during her life so long as she should remain chaste, the husband covenanted generally to pay the said sum to the wife:—

Held, that the covenant, being ambiguous, was controlled by the recital, and that the husband's liability ceased on the wife's failure to remain chaste.

APPEAL from a judgment of the Gloucester County Court.

The plaintiff, who was the wife of the defendant, brought the action to recover 2l. 5s. alleged to be due to her from the defendant for weekly payments under a deed of separation dated March 5, 1910, entered into by the parties.

The deed, after reciting that unhappy differences had arisen between the parties and that they had mutually agreed to live and were then living apart, proceeded as follows: "And whereas the said William Groom Crouch has agreed to allow the said Emily Jane Crouch the sum of 5s. per week for her maintenance during her life so long as she shall remain chaste such weekly payments to commence as from February 5 1910 and whereas the said parties have agreed to enter into such arrangement as is hereinafter contained Now this indenture witnesseth that for effectuating the said agreement and in consideration of the premises, he, the said William Groom Crouch, doth hereby covenant that he, the said William Groom Crouch, will duly and punctually pay or cause to be paid the said sum of 5s. per week to the said Emily Jane Crouch or to such person as

she shall from time to time authorize to receive the same on Saturday in each week."

The defence to the action was that the defendant was not liable to make the weekly payments under the deed because the plaintiff had not remained chaste, and the defendant was prepared with evidence to prove that the plaintiff had committed adultery; but the county court judge held that he had no jurisdiction to try the issue as to the wife's alleged adultery, and he gave judgment for the plaintiff for the amount claimed.

The defendant appealed.

Lowenthal, for the defendant. The county court judge clearly based his decision on a wrong ground. The liability to pay the weekly allowance ceases if the wife does not remain chaste. Although the covenant by the husband to pay is in general terms it is governed by the recital: *Hesse v. Albert*. (1)

S. L. Porter (*H. M. Sturges* with him), for the plaintiff. On the true construction of this deed the husband is not entitled to set up the wife's want of chastity as an answer to the claim for payment of the weekly allowance. A *dum casta* clause is not a usual clause in a separation deed and therefore cannot be inferred in the absence of an express covenant. The operative part of this deed clearly contemplates a payment to the wife during her life, and, therefore, in so far as the covenant is in conflict with the recital the covenant prevails: *Dawes v. Tredwell* (2); *Young v. Smith*. (3) The principle, that where a recital is particular and a covenant is general the recital controls the covenant, only applies to cases of a release, a bond, or a power of attorney. [He also referred to *Ex parte Glyn* (4) and *Norton on Deeds*.]

Lowenthal in reply. This covenant is ambiguous because it does not say when the payments are to begin or how long they are to continue, but the recital is clear, and, therefore, the construction of the deed is governed by the recital: *Ex parte Dawes* (5), per Lord Esher M.R., who states the principle in

(1) (1828) 3 Man. & Ry. 406.

(2) (1881) 18 Ch. D. 354.

(3) (1865) L. R. 1 Eq. 180.

(4) (1840) 1 Mont. D. & De G. 29.

(5) (1886) 17 Q. B. D. 275, at p. 286.

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general terms. There is no authority for its suggested limitation to certain particular kinds of deeds.

LORD COLERIDGE J. In this case the question arises as to the construction of a deed executed on March 5, 1910, between a husband and wife, and it turns upon the relative importance of a recital and a covenant contained in that deed. The recital states that the parties had mutually agreed to live apart, and that the husband had agreed to allow his wife 5s. a week for her maintenance during her life so long as she should remain chaste, such weekly payments to commence as from February 5, 1910. Then the deed continues that for effectuating the said agreement and in consideration of the premises the husband will punctually pay or cause to be paid the said sum of 5s. per week to the wife or to such person as she shall from time to time authorize to receive the same on Saturday in each week.

The question which we have to decide is whether the covenant stands unaffected by the recital or whether the recital governs the terms of the covenant. The possibility of a recital which is a particular recital governing general words in a covenant was debated so long ago as the time of Lord Ellenborough, who in the case of *Payler v. Homersham* (1) said: "I do not find that Lord Holt, when he denied the authority of the case from Roll[e]'s Abridgment, denied also the position of Gregory J., that the general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument truly you must have regard to all its parts, and most especially to the particular words of it." Then in the later case of *Hesse v. Albert* (2) Bayley J., said: "We are bound to look at the whole of the instrument together. The defendant covenants to pay this annuity generally; the agreement was for making it payable out of the salary; which has ceased, not from any act on the part of the defendant. Upon an instrument so framed, I am of opinion that the party is not liable when the fund is taken away." In that

(1) (1815) 4 M. & S. 423 [where Rolle's name is correctly printed a few lines lower].

(2) 3 Man. & Ry. 406.

case the recital said that the money was to be payable out of the defendant's salary, whereas the covenant was to pay generally. That those cases have not been overlooked is shewn by the judgment of Lord Hatherley in *Jenner v. Jenner* (1), because in that judgment he quotes the judgment of Lord Ellenborough in *Payler v. Homersham* (2), and quotes it with approval, and it is quite clear, and the respondent's counsel has admitted, that in certain cases, such as those in which the agreement is concerned with the question of a release, a bond, or a power of attorney, the doctrine I have referred to would apply to the case, and any particular words in the recital would govern any more general words in the covenant. But I do not know any ground for limiting the general rule laid down by Lord Esher in *Ex parte Dawes* (3) to those three particular cases. In that case Lord Esher M.R. said: "Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

It seems to me that the present case falls within the first of these propositions, i.e., where the recital is clear and the operative part is ambiguous. It is true that in *Dawes v. Tredwell* (4) Sir George Jessel used language which, taken apart from the context and from the facts in that case, would seem to bear a different meaning, or rather to bear out the contention of the respondent here, because he says: "The recital here, as is usually the case, is in general terms; the operative part is in definite terms. There is another rule that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-matter. If, therefore, the covenant is clear, it cannot be controlled or affected by the recital." In that case the question was whether you can introduce into a covenant a new covenant

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(1) (1866) L. R. 1 Eq. 361.

(3) 17 Q. B. D. at p. 286.

(2) 4 M. & S. 423.

(4) 18 Ch. D. at p. 359.

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by a party, who had not, except in the recital, agreed to effect such covenant. Clearly in that case one covenant would be clear and the other contradictory. [The terms of the covenant would be contradictory to the terms of the recital, and it would fall within the third proposition laid down by Lord Esher.

In the present case it seems to us that the recital is clear and particular—that this money is to be paid to the wife so long as she is chaste—and the covenant is general, i.e., to pay her 5s. a week, and the case seems to me, therefore, to fall exactly within the principle of *Hesse v. Albert* (1), decided by Bayley J., where the recital declared that the sum in question was to be payable out of a particular fund and the covenant made it payable generally. In that case the sum was to be paid out of a particular fund; in the present case a period of time is mentioned. It seems to me, therefore, that here the recital is particular and the covenant general

The recital is particular because it states that the payment to the wife is to be made so long as she is chaste, but the operative part of the deed is ambiguous because it does not shew when the 5s. begins to be payable or how long the weekly payment is to last—whether it is to be payable for the life of the wife, and whether it is to be paid by the husband's executors in case he predeceases her. Therefore it seems to me that the recital is clear and the operative part ambiguous, and, that being so, the recital governs the construction of the deed. In these circumstances, the case must be remitted to the county court for the judge to consider the facts alleged by the defendant in the action.

HORRIDGE J. I agree. The case of *Hesse v. Albert* (1) seems to me to be an exact authority in this case. The head-note in that case is as follows: "By a deed of separation, after reciting an agreement by the husband to allow the wife 250*l.* out of his salary as a searcher, the husband covenants generally to pay her 250*l.* per annum during her life:—The covenant is controlled by the recital, and dismissal from the office justifies non-payment of the annuity." The only difference between the two cases is that

(1) 3 Man. & Ry. 406.

in *Hesse v. Albert* (1) the general covenant was more specific than in the present case, for there the covenant was to pay during the life of the wife, whereas here the covenant does not state any period during which the payment is to continue, whether it is to be for the husband's life or for the wife's life. This case, therefore, seems to be exactly the case in which it is impossible to ascertain the measure of the covenant without referring to the recital. Counsel for the plaintiff has relied on *Dawes v. Tredwell* (2) and *Young v. Smith* (3), but in both those cases the covenants in question were covenants by the husband only, and were perfectly clear in their terms, and therefore it was held that the operative words of the covenants were not controlled by the recitals. Those decisions do not touch the question which we have to decide in this case.

It was further contended that the doctrine that general words in a covenant may be controlled by particular words in a recital only applies to a certain class of instruments. The authorities shew that that contention is not well founded, for in *Hesse v. Albert* (1) the doctrine was applied to a class of instrument similar to that with which we are dealing in this case, and in *Jenner v. Jenner* (4) and *Ex parte Dawes* (5) the doctrine was also applied to instruments which do not come within the class of instruments mentioned by counsel.

In my opinion on the true construction of this deed the recital governs the covenant, and the husband is, therefore, only liable to pay the weekly allowance so long as the wife remains chaste.

Appeal allowed.

Solicitor for plaintiff: *C. T. Courtney Lewis, for Langley-Smith & Son, Gloucester.*

Solicitors for defendant: *Willis & Willis, for A. L. Lane, Gloucester.*

(1) 3 Man. & Ry. 406.

(3) L. R. 1 Eq. 180.

(2) 18 Ch. D. 354.

(4) L. R. 1 Eq. 361.

(5) 17 Q. B. D. 275.

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Dec. 13.

In re GOLDBURG.*Ex parte* SILVERSTONE.

Bankruptcy—Insolvent Trader—Secured Creditor—Mortgage of Business—Fraudulent Transfer of Business to One Man Company—Bona fide Exchange of Mortgage for Debentures without Notice—Act of Bankruptcy—Title of Mortgage—13 Eliz. c. 5—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (b).

An insolvent trader assigned his business to a one man company for shares and debentures, and induced a bona fide mortgagee of his business, who was no party to the formation of the company, to accept some of the debentures in substitution for his mortgage. Shortly afterwards the trader became bankrupt, and his assignment to the company was set aside as fraudulent under 13 Eliz. c. 5 and as an act of bankruptcy under sub-s. 1 (b) of s. 4 of the Bankruptcy Act, 1883. The company's debentures were worthless:—

Held, that the mortgagee was not remitted to his original position and had no charge on the assets of the bankrupt, but only had a right to prove in the bankruptcy for the damages he had sustained by reason of the debtor's fraud in inducing him to accept worthless debentures for his security.

THIS was an application that raised the question whether one Silverstone had a charge on the bankrupt's assets under these circumstances.

During June and July, 1910, the debtor, who was carrying on the business of a milliner at 36, New Oxford Street, under the name of "Rita," was being much pressed by some of his creditors. On July 28, 1910, he registered a private company called "Rita Limited" with a capital of 2000*l.* divided into shares of 1*l.* each. It was a one man company. By an agreement of the same date, made between himself and the company, he contracted to sell to the company his leasehold premises and business and the goodwill and assets thereof as a going concern for 2500*l.*, to be paid as to 1500*l.* in debentures and the balance of 1000*l.* in fully paid up shares, free from incumbrances, but subject as to the leasehold premises to a first mortgage dated March 1, 1909, to one Beveridge to secure 400*l.* and interest; and the purchase was to be completed on August 1, 1910.

The debtor, however, had given two charges on the business to

Silverstone—one, dated February 22, 1910, being a second mortgage on the leasehold premises and two policies to secure 500*l.* and interest; the other, dated May 31, 1910, being a charge on the book debts to secure 200*l.* and interest. Both these charges were valid securities for money lent. Silverstone knew nothing whatever about the formation of the company until after its registration. The debtor then asked him to accept seven debentures of 100*l.* each in the company in substitution for his two charges, and after some pressure he agreed to do so. Accordingly by deed dated August 9, 1910, indorsed on the mortgage of February 22, 1910, and made between Silverstone and the debtor, after reciting that the 500*l.* was still due on the deed of February 22, 1910, and the 200*l.* was still due on the deed of May 31, 1910, making 700*l.* in all due by the debtor, and that the debtor had assigned his business to a company styled "Rita Limited," and that Silverstone had agreed "to accept in lieu of the within written security seven debentures of 100*l.* each in the said company for securing the repayment of the moneys due to him," it was witnessed that, in consideration of the issue and assignment to Silverstone of 700*l.* debentures in the company, Silverstone thereby released "the security contained in the within written indenture" to hold the same unto the debtor absolutely; then followed a reassignment of the leasehold hereditaments to the debtor "freed and discharged from the principal moneys and interest therein mentioned." The deeds were given up by Silverstone, and seven of the fifteen debentures were shortly afterwards issued to Silverstone directly by the company. The debtor also made over five of the remaining debentures to his wife. This left him with three debentures and the 1000 shares. He and his wife were the only directors of the company.

On November 22, 1910, a receiving order was made against the debtor on a creditor's petition presented on the previous September 12. Adjudication followed. His liabilities were about 1500*l.*, and he had no assets other than his three debentures and 1000 shares of the company. On July 18, 1911, a compulsory winding-up order was made against the company. It had no assets other than the business of the debtor.

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On October 25, 1911, on the motion of the trustee, the Court set aside the agreement of July 28, 1910, as fraudulent and void under the statute 13 Eliz. c. 5, and also as an act of bankruptcy under s. 4, sub-s. 1 (b), of the Bankruptcy Act, 1883, but reserved to Silverstone (who was not a party to the motion) the right to substantiate a claim to a first charge on the assets of the debtor in respect of his advances to the debtor represented by his 700*l.* debentures in the company.

The motion was set down again for hearing on the point reserved.

Powell, K.C., and Tindale Davis, for Silverstone. This case is governed by Melinsky's case in *In re Slobodinsky* (1), and Silverstone comes within the protection of s. 49 of the Bankruptcy Act, 1883; but if he is not within s. 49, he is entitled to relief on the equitable grounds stated by Wright J. on pp. 531, 532, in the same case.

Clayton, K.C., and F. Mellor, for the trustee. Silverstone cannot rely on Melinsky's case, and it is submitted that the dictum of Wright J. that the protection of s. 49 may be extended on equitable grounds, cannot be supported. In the first place, Melinsky took under a bargain with Slobodinsky before the company was formed, but here Silverstone took his debentures directly from the company after its formation under a bargain to take a charge on the assets of the company in exchange for his mortgages. He got what he bargained for and has now no mortgage on the bankrupt's assets by virtue of the debentures, but only a general charge on the assets of the company. If the bankrupt deceived him, his remedy is to prove in the bankruptcy for the damages he has sustained by reason of the bankrupt's fraud. Secondly, equity cannot interfere with the operation of a statute. Bankruptcy law is a creature of statute. The first Bankruptcy Act was 34 & 35 Hen. 8, c. 4. That Act was extended by 13 Eliz. c. 7, which enacted that if any trader did any of the acts therein specified with intent to delay or hinder any creditor he should be deemed a bankrupt. The first Act to give protection to a creditor dealing in good faith and for valuable

(1) [1903] 2 K. B. 517, 529, 530.

consideration with a debtor without notice of an act of bankruptcy was 46 Geo. 3, c. 135, and that statutory protection as now modified is embodied in s. 49, and that section only protects dealings with the bankrupt directly. The old equity cases cited by Wright J. were instances of what was called the auxiliary jurisdiction of the Court of Chancery to grant discovery in aid of an action at law—*Basset v. Nosworthy* (1)—and are no authority for the proposition that the Bankruptcy Court in applying a bankruptcy statute can extend or alter the statutory provisions in favour of purchasers for value without notice: *Latouche v. Lord Dunsany* (2); *Lodge v. Harper*. (3) Here the fact that the debtor was fraudulent and formed a one man company makes no difference. Silverstone has no charge on the property of the debtor, but only a general charge on the assets of the company if there are any: *Athenæum Life Assurance Society v. Pooley* (4); *In re Hirth*. (5)

Powell, K.C., in reply. Apart from the old cases, what is the position? If there had been no sale to the company, Silverstone had a valid mortgage and the debtor's property could only have vested in the trustee subject to that mortgage; but because the sale to the company is set aside in consequence of the debtor's fraud, to which Silverstone was no party, it is said that the trustee is entitled to a great deal more than he would have had. The debtor could not have carried out his contract with the company without Silverstone's assistance. By the debtor's fraud Silverstone was induced to give up his mortgage for a consideration that has totally failed. The whole transaction with the company having been set aside as a fraud, it is submitted that Silverstone under the circumstances is remitted to his original position and is entitled to a charge on the debtor's business and book debts for his 700*l.*

PHILLIMORE J. I am sorry I cannot help Mr. Silverstone. I accept his evidence that he had made considerable advances to Goldberg, sufficient to warrant the two indentures of mortgage for 500*l.* and 200*l.* which he had taken. If the

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(1) (1673) W. & T. L. C., 7th ed.,
vol. ii., 150, 173.

(3) [1908] 1 K. B. 744.

(4) (1858) 3 De G. & J. 294.

(5) [1899] 1 Q. B. 613, 623.

(2) (1803) 1 Sch. & Lef. 137, 157.

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Phillimore J.

matter had rested there, and Goldburg had done some act of bankruptcy other than that which he did, and Mr. Silverstone had claimed to be a secured creditor, I should upon the evidence before me have held that he had proved his security, but unfortunately for him he has thrown away the substance for a shadow.

Goldburg, being in difficulties and being fraudulently minded, conveyed his business to a company so as thereby to defeat or delay his creditors. On July 28 he contracted to sell his business to the company unencumbered except as to the first mortgage. That made it necessary for him to get a release of the two charges which he had given to Silverstone, and by August 9 he persuaded Silverstone to release those charges for that which Goldburg led him to believe was their equivalent in value, 700*l.* worth of debentures in this new company which Goldburg had floated and to which he was conveying his business. It is proved that those debentures are worth next to nothing. I having found it necessary to set aside the conveyance of Goldburg's business to the company, the company is left with nothing, unless it may be two or three pounds subscribed by some of the shareholders who signed the memorandum of the company, or some small amounts it may have made before the transfer was set aside, and the debentures are there, but they are a charge upon that which is almost a blank. I am very sorry for Mr. Silverstone, but I cannot help him. He has taken those debentures, believing that the company was a sound one, believing that the assignment to the company was good, and it turns out that there is nothing or next to nothing behind them. That is the whole of the story. It is said that inasmuch as if he had not released his charges Goldburg never could have conveyed to the company, he is therefore entitled, when the conveyance is set aside, in some way to be restored to his position of a secured creditor. I cannot see that. It was a matter of bargain between them. Goldburg had contracted to sell to the company; he could not perfect his title unless he got in the outstanding incumbrances, and having formed the company he goes to his friend and victim and gets him to release his charges for these debentures instead of good solid sovereigns. It is said

that this case is governed by Melinsky's case in the case of *In re Slobodinsky*. (1) If and so far as it falls under any of the categories in *Slobodinsky's Case* (1), to my mind it falls under the category of Bernstein and Levartovsky and not under the category of Melinsky. As to Bernstein and Levartovsky, Wright J. said at p. 529: "As to all these persons, except Melinsky, it might be enough to say that inasmuch as the debentures are merely a general charge on the property of the company they probably do not attach to anything which turns out not to have become the property of the company." I am quite aware that the learned judge goes on to say that it is desirable to consider each case with reference to the other circumstances; nevertheless I think the principle which he there laid down is sound and right and the principle which I ought to follow in this case.

With regard to the case of Melinsky, it was a very peculiar one, and, whereas one sees that the learned judge did very substantial justice, it is a little difficult to understand exactly under what category he brought him. I think the way in which he considered it was this. Melinsky dealt with Slobodinsky without knowledge of the bankruptcy and for valuable consideration, and his contract with Slobodinsky ought to stand. It was a contract by which he was entitled to 4400*l.* in cash or bills, and he turned it into a contract under which he was to get nothing direct from Slobodinsky, but was to take 4000*l.* in debentures and 400*l.* in cash from the company. His contract with Slobodinsky was before the transfer to the company and he was a necessary party to the transfer to the company, and in substance Wright J. held that Melinsky was entitled to the consideration which Slobodinsky had promised to give him, and that consideration was 4000*l.* in debentures and 400*l.* in cash in a company which had all Slobodinsky's business, and therefore the transaction was within the protection of s. 49, and he was entitled to a charge on Slobodinsky's assets for any deficiency that he could not recover from the company. At any rate that is the best explanation I can give of Melinsky's case, and, thinking it out of the road here and being driven back on principle, I say, with regret, that I am unable to help

1911

GOLDBURG,
*In re.*SILVER-
STONE,
Ex parte.

Phillimore J.

(1) [1903] 2 K. B. 517, 529, 530.

1911

GOLDBURG,
In re.
 SILVER-
 STONE,
Ex parte.

Mr. Silverstone except by making my dismissal of his application to be without prejudice to his rights to prove against Goldburg's estate for the damages he has sustained by reason of having been induced to accept these worthless debentures.

Solicitors : *James Dowling ; Boyce & Evans.*

H. L. F.

1911

Dec. 18.

In re ASHWELL.

Ex parte SALAMAN.

Bankruptcy—Bankruptcy Petition—Adjournment on Payment of Money—Misrepresentation as to Party paying—Estoppel—Trustee's Title by Relation back—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43.

A debtor obtained the adjournment of a bankruptcy petition pending against him by paying the petitioning creditors 125*l.*, which they accepted on his representation made at the time that the money was not his but that of a third party. This representation was untrue. Within three months the debtor was adjudicated bankrupt, and the trustee, on the doctrine of relation back, claimed repayment of the 125*l.* from the petitioning creditors on the ground that it was part of the property of the bankrupt:—

Held, that the trustee had a higher and better title than the debtor and was not estopped by the debtor's misrepresentation from enforcing the repayment of the money.

THIS was an application by the trustee in bankruptcy of A. T. Ashwell that a sum of 125*l.* might be paid to him by the liquidator of the London Trading Bank, Limited, under these circumstances.

On March 17, 1911, a bankruptcy petition was presented against the debtor by the London Trading Bank, Limited, based on an act of bankruptcy committed by the debtor on the previous February 20. On April 11, the return day of the petition, it was adjourned until May 9, when a receiving order was made against the debtor; adjudication followed on May 23, and Mr. Salaman became the trustee. The bank subsequently went into liquidation.

The adjournment of the petition on April 11 was obtained

under these circumstances. On April 10 Mr. Wittey, a clerk of the debtor, acting on his instructions, saw Mr. Davis, the solicitor of the petitioning creditors, and asked for an adjournment of the petition and offered to pay 125*l.* on account of the debt. Mr. Davis agreed to arrange an adjournment provided the 125*l.* was not the money of the debtor. The next morning (April 11) Mr. King and Mr. Wittey, two clerks of the debtor, and acting on his instructions, met Mr. Davis at Bankruptcy Buildings, when a representation was made by them or one of them to Mr. Davis to the effect that the 125*l.* was the money of Mr. Acton Walker, the debtor's son-in-law, and came through Messrs. Tutin, Marshall & Co., the solicitors of the son-in-law. Mr. Davis accepted the 125*l.* on this representation and gave the following receipt:—

“ Re Arthur T. Ashwell.

“ Received this 11th day of April, 1911, of Mr. T. Acton Walker (per Tutin, Marshall & Co.) the sum of one hundred and twenty-five pounds it being expressly stated by the said Messrs. Tutin, Marshall & Co. that such sum in nowise forms part of the estate of the said Arthur T. Ashwell or in anywise belongs to him or is his money.”

Mr. Davis accordingly adjourned the petition. The 125*l.* was afterwards paid over to the liquidator of the bank. In October following it was discovered that the 125*l.* was in fact the debtor's money, so that the representation made to Mr. Davis on the adjournment of the petition was untrue. An application by the trustee for repayment of the 125*l.* having been refused, he made the present application, asking for a declaration that the 125*l.* formed part of the property of the bankrupt divisible amongst his creditors, and for payment of that sum by the liquidator of the bank with costs.

E. W. Hansell, for the trustee, stated the facts.

Gilbert Beyfus, for the liquidator of the bank. The debtor is estopped by his misrepresentation from now saying that the money was his—*Pickard v. Sears* (1); *Freeman v. Cooke* (2)—and his trustee in bankruptcy is in no better position: *Jones v.*

1911

ASHWELL,
In re.
SALAMAN,
Ex parte.

(1) (1837) 6 Ad. & E. 469, 474.

(2): (1848) 2 Ex. 654.

1911

ASHWELL,
In re.
SALAMAN,
Ex parte.

Yates (1); *Harris v. Truman*. (2) The case of *Heilbut v. Nevill* (3) may be cited by the trustee, but is distinguishable. There the creditor was aware of the fraud the debtor was committing.

E. W. Hansell in reply. Under s. 43 of the Bankruptcy Act, 1883, and the doctrine of relation back, the trustee has a higher and better title than the bankrupt. It was his money and not the debtor's that was paid over, and he is in no way affected by the misrepresentation made by the debtor. Moreover the bank did not alter its position, for the receiving order was made on the adjourned hearing of the same petition.

PHILLIMORE J. In this case the petitioning creditors in the bankruptcy of Mr. Ashwell were induced on April 11 of this year to postpone the hearing of their petition in consideration of their receiving a sum of 125*l.* This petition was heard on a later date, and the receiving order was made and an adjudication followed. The 125*l.* they received was unquestionably the money of the bankrupt, and they received it, of course, with notice of an act of bankruptcy, because they were themselves relying upon one or two acts of bankruptcy in their petition on which they got the adjudication. Their answer to the demand of the trustee is: "Quite true, but we believed, and more, it was represented to us, that this was not Ashwell's money, and unless it had been so represented and we had acted on the faith and belief in that representation, we never should have taken it and never should have adjourned the petition." It is suggested that they did not alter their position on the faith of this representation. As to that I am not so sure. It is also suggested that they did not believe this representation, and as to that I am not sure. But assuming that Mr. Davis believed the representation made to him that the 125*l.* was not Ashwell's money, I do not think that there is an estoppel. No doubt, when a bankrupt is estopped by some representation of his made in the course of carrying on his business, his trustee who takes his estate would be, just as much as an executor, bound, quoad the estate, by the representation, and be estopped. But here the trustee takes by a

(1) (1829) 9 B. & C. 532.

(2) (1882) 9 Q. B. D. 264.

(3) (1870) L. R. 5 C. P. 478.

higher title. This 125*l.* was the trustee's money by reason of the doctrine of relation back, and any statement made at the time of payment on behalf of Ashwell that it was not Ashwell's money cannot estop the trustee from claiming the money. For this purpose, Ashwell and the trustee are different persons, and it is just the same as if Ashwell had represented that it was the money of somebody else than his son-in-law Walker. This was not Ashwell's money to make any representation about at all. It was in the contemplation of the law the trustee's money, and, therefore, there is no estoppel; and notwithstanding the argument of Mr. Beyfus, I must decide against him, and make an order in the terms of the notice of motion with costs.

Solicitors: *B. Barnett; Beyfus & Beyfus.*

H. L. F.

1911

ASHWELL,
In re.

SALAMAN,
Ex parte.

Phillimore J.

In re BURGE, WOODALL & CO.

Ex parte SKYRME.

1911

Dec. 18.

Bankruptcy—Stock Exchange—Brokers—Pledge of Customer's Securities and their own with Bank—Marshalling Securities.

A. employed brokers to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price and he paid the margin in cash or in account. It was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers on deposit of A.'s securities so purchased. The brokers, however, pledged A.'s securities and their own with their bankers as cover for their current overdraft. On the bankruptcy of the brokers the bank paid themselves by selling A.'s securities and handed over the surplus securities in their hands to the trustee in bankruptcy:—

Held, that by analogy to the doctrine of marshalling A. was entitled to have the surplus securities in the hands of the trustee applied towards satisfaction of the balance due to him from the brokers on the account between them.

THIS was an application by a creditor claiming certain securities and cash in the hands of the trustee under these circumstances.

The debtors were brokers on the Stock Exchange carrying on

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BURGE,
WOODALL
& Co.,
In re.

SKYRME,
Ex parte.

business under the style of Burge, Woodall & Co. Skyrme was one of their customers, and for many years prior to their bankruptcy he bought and sold stocks and shares through them on the Stock Exchange. When he bought stocks or shares the debtors, under the arrangement between him and them, took up the stocks and shares so purchased on his behalf and advanced him part of the purchase price on the security of the same, and he paid the balance of the price either by cash or in account. It was also understood between them that the advances so made were obtained by the debtors on loan from their bankers on the deposit of the securities so purchased, and the debtors charged him interest on their advances at $\frac{1}{2}$ per cent. above the bank rate in the fortnightly accounts that they rendered him. Skyrme had no account at the bank and had no communication with the bank. It was at the debtors' suggestion that he did not borrow from his own bank, and he understood that he could at any time go to the bank and obtain his securities on payment to the bank of the amount owing by him to the debtors for the advances made by them to him.

On November 5, 1910, a receiving order was made against the debtors, and adjudication followed. It then transpired that the debtors had lodged at the bank not only Skyrme's securities, but also securities of their own and of another customer called Weber, as cover for their current overdrawn account with the bank.

On November 15, 1910, the bank sold Skyrme's securities, which consisted of 15,000*l.* London, Chatham and Dover ordinary stock and 4000*l.* Caledonian Railway preference stock, for 4409*l.* 7*s.* 6*d.*, and therewith satisfied the debtors' overdraft, and handed over the surplus securities in their hands (including Weber's), which were of a speculative character, to the trustee in bankruptcy. In the account between Skyrme and the debtors the amount due by him to them for advances on his said stocks was 2609*l.* 12*s.* 3*d.*, and the difference between this sum and the 4409*l.* 7*s.* 6*d.*, namely, 1799*l.* 15*s.* 3*d.*, was the credit balance due to him from them in respect of the same stocks. The account between Weber and the debtors in respect of his securities shewed a balance of 100*l.* due from him to them, and this

sum he paid the trustee in bankruptcy. Skyrme claimed that the surplus securities in the hands of the trustee in bankruptcy and the 100*l.* paid by Weber ought to be transferred and paid to him on account of his claim of 1799*l.* 15*s.* 3*d.* against the debtors, and now applied for an order to that effect.

1911

BURGE,
WOODALL
& Co.,
In re.

SKYRME,
Ex parte.

Felix Cassel, K.C., and Howard Wright, for the application. The debtors were Skyrme's agents to buy securities and to pledge them for so much of the purchase-money as was not provided by him. That was the only authority they had. They were in fact mortgagees of his securities and could only sub-mortgage or pledge the securities for the amount due to them from him. It was a gross breach of duty on their part to pledge his securities with their bankers for more than the amount due to them from him, and under the doctrine of marshalling he is entitled to have the surplus securities which the bank held, and the 100*l.* paid by Weber, applied in reduction of the 1799*l.* 15*s.* 3*d.* due to him from the debtors: *Baldwin v. Belcher*. (1)

[They were stopped.]

E. W. Hansell, for the trustee. This is not a case of marshalling at all. That doctrine only applies as between mortgagees, and this is an attempt to extend the doctrine to mortgagors. The debtors were entitled to mortgage Skyrme's securities and their own securities, and as between two mortgagors there is no equity to marshal. Skyrme is really claiming to be pro tanto a secured creditor, but he is not a person holding "a mortgage, charge or lien" on the debtors' property within s. 168 of the Bankruptcy Act, 1883, and can only prove for the difference between the price of his securities and what was realized from them. He has no lien on any shares for that difference, and is not entitled to any preferential treatment. At any rate, as to the 100*l.*, he has no equity. That sum formed no part of the security held by the bank. Weber's account with the debtors was in debit, his securities were gone, and he paid the trustee the 100*l.* to balance his account.

Felix Cassel, K.C., in reply on the 100*l.*

(1) (1842) 3 D. & War. 173.

1911

BURGE,
WOODALL
& Co.,
In re.

SKYRME,
Ex parte.

PHILLIMORE J. I think Mr. Skyrme is entitled to succeed. Upon my view of the evidence the nature of the contract between these bankrupt stockbrokers and their client, Mr. Skyrme, was such that they were bound when borrowing from the bank and depositing Mr. Skyrme's securities to inform the bank that Mr. Skyrme's securities were only to be liable to an amount equivalent to the sum of money which they, the brokers, had advanced to Mr. Skyrme. That in my opinion is the true view of the transaction. That being so, the only estate or interest in these securities which the bankrupts could pass to the bank was the amount they were lending to Mr. Skyrme on the securities. But the brokers passed to the bank all their apparent interest in the securities, and the bank had no notice of what might be the interest of the brokers' clients. The question now arises on the insolvency of the brokers as to what are the rights of Mr. Skyrme, whose property was transferred to the bank by the legal holders in a way and to an extent which as between themselves and Skyrme they had no right to transfer. In my opinion Skyrme is entitled to say "To the extent to which there are securities in the hands of the bank, there being no rival claimant in the same position as myself, I am entitled to be satisfied for the misfeasance which has taken place with regard to my securities by reason of the brokers passing the property in my securities to an extent to which under their contract with me they ought not to have passed it." It is not exactly marshalling, although I think the doctrine of marshalling is of some assistance, and I think it right in this case to apply the analogy of marshalling and to make an order in favour of the applicant. But there is also a claim to a sum of 100*l.* which was paid by Weber, another client of the brokers, to the trustee in bankruptcy, because the securities which were purchased for him and which were pledged in the same way by the brokers with the bank did not realize, when sold, within 100*l.* of the amount due from Weber to the brokers. If personal liability of the client to pay had been part of the brokers' securities and had been sub-pledged by them to the bank, then I think there might be something in the contention. But in my view of the transaction the brokers, whatever remedies they had against their

client, did not pass his personal liability as part of their security to the bank. Therefore this 100*l.* is not in any sense part of the securities deposited with the bank, and Mr. Skyrme has no claim to it. As to the rest he has, as I have said, a good claim, and I make an order accordingly with costs.

1911

BURGE,
WOODALL
& Co.,
In re.

SKYRME,
Ex parte.

Solicitors : *Morley & Shirreff; Michael Abrahams, Sons & Co.*

H. L. F.

In re PICKARD.

Ex parte OFFICIAL RECEIVER.

1911

Dec. 11.

Bankruptcy—Committal—County Court—Order for Payment of Part of Salary—Default in obeying Order—Necessity for Personal Service of Order—Indorsement—County Court Rules, 1903, Order xxv., r. 58—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 24, 53.

An order was made against a bankrupt, who was in receipt of a salary, by a county court sitting in bankruptcy under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, for the payment by him by monthly instalments of a portion of his salary to the trustee for the benefit of his creditors. A sealed copy of the order was served on the bankrupt by being sent by post by registered letter to his address in accordance with s. 142 of the Bankruptcy Act, 1883, and r. 92 of the Bankruptcy Rules, 1886 and 1890. The bankrupt having made default in payment of the instalments under the order, the trustee applied in the county court to commit him for contempt of court. The county court judge held that, inasmuch as the sealed copy of the order had not been indorsed with a notice stating that unless the bankrupt obeyed the order he would be guilty of a contempt of court and liable to be committed to prison, and had not been personally served upon him, as required by Order xxv., r. 58, of the County Court Rules, 1903, he had no jurisdiction to commit:—

Held, that Order xxv., r. 58, of the County Court Rules, 1903, which dealt with a warrant of attachment, did not apply in bankruptcy, and that the county court judge sitting in bankruptcy had power, either under s. 24, sub-s. 4, of the Bankruptcy Act, 1883, or under his general jurisdiction, to make an order of committal.

APPEAL from the county court of Essex holden at Chelmsford.

On April 6, 1908, a receiving order was made against the debtor on his own petition in the county court of Essex holden at Chelmsford, and on the same day he was adjudged bankrupt.

1911

PICKARD,
In re.
OFFICIAL
RECEIVER,
Ex parte.

The official receiver was the trustee in bankruptcy of his property. The debtor was in receipt of a salary of 400*l.* per annum, and on May 6, 1908, upon the application of the trustee, an order was made by consent by the county court in bankruptcy under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, that the annual sum of 80*l.*, portion of the said salary, be paid by the debtor to the trustee by monthly payments of 6*l.* 13*s.* 4*d.* out of his said salary, to be applied in payment of his debts, the first of such payments to be made on June 5, 1908, and to be continued monthly.

The debtor was present in Court when the above order was made, and on the same day a sealed copy of the order was sent to him by post by registered letter to his address in accordance with s. 142 of the Bankruptcy Act, 1883, and r. 92 of the Bankruptcy Rules, 1886 and 1890. The copy of the order so sent was not indorsed with the notice specified in Order xxv., r. 58, of the County Court Rules, 1903, and Form 346 in the appendix thereto, namely, "Take notice that, unless you obey the directions contained in this order, you will be guilty of a contempt of court and will be liable to be committed to prison."

On January 18, 1909, the debtor applied to the county court for his discharge, and an order was made that his discharge should be suspended for two years from that date and that he should be discharged on January 18, 1911, the order of discharge to be subject to and without prejudice to the order of May 6, 1908, which was to continue in force after the expiration of the two years' suspension of discharge and be enforceable by the official receiver in the same manner as if the order of discharge had not been granted. The debtor was present in Court and signed a consent that the order of May 6, 1908, should so continue in force.

The debtor duly paid to the official receiver the monthly instalments of the 80*l.* per annum down to and including that due on April 5, 1911, but he failed to pay the instalments due since that date. On September 8, 1911, there being then five monthly instalments unpaid, amounting to 33*l.* 6*s.* 8*d.*, notice of motion in the county court sitting in bankruptcy was served upon the debtor on behalf of the official receiver for an order for the committal of the debtor to prison for contempt of court in

having failed to pay to the official receiver the sum of 33*l.* 6*s.* 8*d.* pursuant to the order of May 6, 1908. This notice was personally served on the debtor in accordance with r. 86 of the Bankruptcy Rules, 1886 and 1890.

Upon the motion coming on for hearing it was contended on behalf of the debtor that the county court judge had no jurisdiction to make an order of committal, inasmuch as a sealed copy of the order of May 6, 1908, had not been personally served on the debtor indorsed with a notice in accordance with Order xxv., r. 58, of the County Court Rules, 1903, and Form 346 in the appendix thereto. The county court judge held that this contention was correct and dismissed the motion to commit.

The official receiver appealed.

E. W. Hansell, for the official receiver. It is admitted that Order xxv., r. 58, of the County Court Rules, 1903, was not complied with, but those Rules do not apply to bankruptcy proceedings in the county court. The Bankruptcy Acts and Rules alone apply. By s. 142 of the Bankruptcy Act, 1883, and r. 92 of the Bankruptcy Rules, 1886 and 1890, it was sufficient to serve the order of May 6, 1908, by sending it by post by registered letter to the debtor's address. That was complied with in this case, and it is not a condition precedent to the committal of the debtor for disobedience to that order that a sealed copy of the order indorsed as required by Order xxv., r. 58, of the County Court Rules, 1903, should have been personally served upon him. The order comes within the words of s. 24, sub-s. 2, of the Bankruptcy Act, 1883, "and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may . . . be directed by the Court," and the motion to commit is made under sub-s. 4 of that section, which gives a simple remedy by committal for contempt in not obeying the order. The notice of motion to commit was served on the debtor personally as required by r. 86 of the Bankruptcy Rules, 1886 and 1890. The Bankruptcy Act and Rules (rr. 85—87) give a remedy by committal and not by attachment. The distinction between committal and attachment still exists: *Taylor, Plinston*

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PICKARD,
*In re.*OFFICIAL
RECEIVER,
Ex parte.

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PICKARD,
In re.
OFFICIAL
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Brothers & Co. v. Plinston. (1) The group of rules in Order xxv., rr. 57—63, of the County Court Rules, 1903, are under the heading "Warrant of Attachment"; and the forms 347, 348, 349, in the appendix, which carry out those rules, though they speak of a "committal," shew that the committal is carried out by a warrant of attachment. Sect. 4, sub-s. 5, of the Debtors Act, 1869 (32 & 33 Vict. c. 62), excepts from the abolition of imprisonment for debt for making default in payment of a sum of money the case of default in payment for the benefit of creditors of any portion of a salary or other income ordered to be paid by a Court having jurisdiction in bankruptcy, and it may be that at that time attachment was the proper remedy. But s. 24 of the Bankruptcy Act, 1883, is a later enactment, and that enactment makes it a contempt of court which is punishable by committal. In the analogous case of an application under s. 5 of the Debtors Act, 1869, to commit a judgment debtor who has made default in payment of a debt or instalment of a debt due from him in pursuance of an order or judgment of a Court, to which by r. 361 of the Bankruptcy Rules, 1886 and 1890, the County Court Rules for the time being in force apply, personal service of the order for payment is not necessary: *Haydon v. Haydon.* (2) If, however, s. 24 is not applicable to default in obeying an order made under s. 53, sub-s. 2, the county court in bankruptcy, which has by s. 100 of the Bankruptcy Act, 1883, all the powers and jurisdiction of the High Court, has power under its general jurisdiction to commit the debtor to prison. The county court judge was therefore wrong in dismissing the motion to commit.

Tindale Davis, for the debtor. Sect. 24 of the Bankruptcy Act, 1883, has no application to an order for payment under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, of part of a bankrupt's salary or income to the trustee for the benefit of the creditors. Sect. 24 deals with the duties of a debtor as to discovery and realization of his property. That section deals with the property of the debtor which passes directly to the trustee in bankruptcy under s. 44. The words in s. 24, sub-s. 2, "and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be

(1) [1911] 2 Ch. 605.

(2) [1911] 2 K. B. 191.

reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders," follow a specific provision requiring the debtor to "give such inventory of his property, such list of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments," and then come the words given above. All those requirements relate to property which vests by the Act in the trustee in bankruptcy. Then sub-s. 4 refers only to "property which is divisible amongst his creditors under this Act," which cannot apply to property coming within s. 53. Sect. 53 deals with property which does not pass directly to the trustee under s. 44: *In re Huggins, Ex parte Huggins* (1); *In re Lupton, Ex parte Official Receiver*. (2) The bankrupt's salary only passes to the trustee if and in so far as an order is made under s. 53, sub-s. 2, for payment of the whole or part of it to the trustee. The proper and only mode of punishing disobedience to an order made under s. 53 is under s. 4, sub-s. 5, of the Debtors Act, 1869: Williams on Bankruptcy, 9th ed., p. 285; Wace on Bankruptcy, p. 264. That being so, the remedy is by attachment: Williams on Bankruptcy, 9th ed., p. 713. The distinction between attachment and committal is expressed in the argument in *Taylor, Plinston Brothers & Co. v. Plinston* (3): "Attachment is the proper remedy for neglect of an order to do a particular act; committal for disobedience to an order to abstain from doing an act." That is the distinction stated by Chitty J. in *Callow v. Young* (4), and cited in the Annual Practice, 1912, vol. i., p. 727. The remedy being by attachment and not by committal, Order xxv., r. 58, of the County Court Rules, 1903, requires a sealed copy of the order, indorsed with a notice stating the consequences of disobedience thereto as given in Form 346 in the appendix, to be personally served on the person sought to be attached. The county court judge was

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 PICKARD,
In re.

 OFFICIAL
 RECEIVER,
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(1) (1882) 21 Ch. D. 85.

(3) [1911] 2 Ch. 605, at p. 607.

(2) Ante, p. 107.

(4) (1887) 56 L. J. (Ch.) 690.

1911

PICKARD,
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OFFICIAL
RECEIVER,
Ex parte.

therefore right. [Rule 1 of the General Orders made in 1870 by the Court of Chancery under the Debtors Act, 1869, was also referred to.]

E. W. Hansell was not called upon to reply.

PHILLIMORE J. This is an appeal against the refusal of the county court judge to commit the debtor to prison upon the ground that the proper process is by attachment against the defaulting debtor, and that it is necessary to the process of attachment under the County Court Rules, 1903, that the person so proceeded against should have been personally served with a sealed copy of the order which he is alleged to have disobeyed with a notice indorsed upon it warning him of the consequences of disobedience. That is certainly true of the process of attachment in the county court, and I will assume for this purpose that it may be true of all processes of attachment. The answer is that this is not a process by way of attachment. It is a process by way of motion to commit. It is contended on behalf of the debtor that a motion to commit is not the appropriate process in this case. It is on the other hand contended on behalf of the official receiver that the county court judge had jurisdiction to enforce an order made under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, by committal either under s. 24, sub-s. 4, of the Act or under the general jurisdiction of the county court in bankruptcy to enforce its own orders. In my opinion the contention of the official receiver is correct. In the first place, the order under s. 53, sub-s. 2, seems to me to be an order made "in relation to" the debtor's "property and the distribution of the proceeds amongst his creditors" within the meaning of s. 24, sub-s. 2, and was therefore enforceable by committal under sub-s. 4. I am aware that the salary in question is not property which passes absolutely and directly to the trustee in bankruptcy; it is property which, as pointed out in *In re Huggins, Ex parte Huggins* (1), can be dealt with by the Court, upon the application of the trustee, under s. 53, sub-s. 2, for the benefit of the creditors. It is, nevertheless, property of the bankrupt in the general sense and may well be covered by s. 24.

(1) 21 Ch. D. 85.

If, however, s. 24 is not wide enough to cover it, there remains the general jurisdiction of the county court sitting in bankruptcy, which, by s. 100 of the Act, has all the powers and jurisdiction of the High Court, to enforce obedience to its orders by committal. The case of *In re Hooley* (1) affords a useful illustration as to the power of the High Court sitting in bankruptcy to punish contempt of court by committal. Disobedience of an order of the High Court in bankruptcy can only, so far as I can see, be punishable by committal. I see no provision either in the Bankruptcy Acts or in the Bankruptcy Rules for the exercise of the power of attachment. But even if the order may be enforced by attachment, it can none the less be enforced by committal. It is true that Order xxv., rr. 57—61, of the County Court Rules, 1903, provide for proceeding by way of attachment, but curiously enough the expressions “committal” and “attachment” are both used in Forms 346—349 in the appendix to the Rules. The county court in the exercise of its ordinary jurisdiction has the power to attach, and there are certain conditions precedent to the exercise of that power specified in Order xxv., r. 58, which have not been complied with in this case. At the same time the county court, when exercising its bankruptcy jurisdiction, has all the powers and jurisdiction of the High Court to commit for contempt, and the mode in which that power shall be exercised is specified in the Bankruptcy Rules, 1886 and 1890, rr. 85—88, and those rules do not require that the person proceeded against shall be personally served with a sealed copy of the order which he is alleged to have disobeyed indorsed with a notice warning him of the consequences of disobedience to it. Those conditions are not required in the case of an order of committal. In the present case there is no question of any hardship, because the debtor had full notice of the order and has complied with it for some years by paying the monthly instalments. The point raised is a purely technical one, which however the debtor had a right to take. It seems to me that the proper procedure was adopted by the official receiver, and all the necessary conditions have been complied with. The order of committal ought therefore to have been made, and the appeal will be allowed.

(1) (1898) 5 Manson, 331.

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BUCKNILL J. I am of the same opinion. Sect. 24, sub-s. 4, of the Bankruptcy Act, 1883, provides that if a debtor wilfully fails to perform the duties imposed on him by the section he shall be guilty of a contempt of court, and may be punished accordingly. I am inclined to think that this case comes within that section, but I prefer to rest my judgment upon the general power of the Court to make this order of committal.

Appeal allowed. (1)

Solicitor for official receiver: *Solicitor to Board of Trade.*

Solicitors for debtor: *Colyer & Colyer.*

W. F. B.

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Dec. 12.

FAIRHURST v. PRICE.

Revenue—Beerhouse Licence—Sale by retail of "Beer" without Licence—Excise Penalty—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 43; s. 50, sub-s. 3; ss. 52, 92; s. 96, sub-s. 6; First Schedule, Head C.

By the first clause of s. 52 of the Finance (1909-10) Act, 1910, the expression "beer" in Part II. of the Act "includes ale, porter, spruce beer, black beer, and any other description of beer, and any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time is found to contain more than two per cent. of proof spirit":—

Held, that the clause is divisible into two parts (of which the first ends, with the words "and any other description of beer"), each of which comprises a definition of "beer"; and that a liquid may be "beer" within the meaning of the first part of the clause although it does not contain more than 2 per cent. of proof spirit so as to be "beer" within the meaning of the second part of the clause.

An information was laid against the appellant under s. 50, sub-s. 3, of the Finance (1909-10) Act, 1910, for having sold by retail certain beer without having taken out a licence as required by the Act. The liquor was sold by the appellant at his shop, in which were exhibited certain advertisements containing the statements that "ales and stouts" offered to the public on the premises were "manufactured at about the same strength as ordinary ales and stouts," and "Finlay's

- (1) An order of committal was made, the order to lie in the office for one month, and not to be enforced if the debtor complied with the order, without prejudice to an application being made by the debtor to the county court to amend, vary, or modify the order of May 6, 1908.

ales and stouts" were "brewed from the best malt, Kent and Worcester hops." The liquor was in fact of the ordinary gravity of beer. It contained 2 per cent. of proof spirit and was manufactured from liquid glucose and hops and was fermented with yeast. In colour, appearance, and taste it was exactly like ordinary beer, and the brewers of it paid duty upon it. The justices before whom the information was laid found that the liquor was "beer" within the meaning of the first clause of s. 52 of the Finance (1909-10) Act, 1910, and convicted the appellant:—

Held, that the conviction was right inasmuch as a licence to sell beer by retail is required by virtue of s. 43, s. 92, s. 96, sub-s. 6, and the First Schedule, head C, of the Finance (1909-10) Act, 1910, and the justices were warranted in finding upon the evidence that the liquor was "beer" within the meaning of the first part of the first clause in s. 52.

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CASE stated by justices for the county borough of Warrington.

An information was preferred by the respondent Price, one of His Majesty's officers of Customs and Excise under the Finance (1909-10) Act, 1910, against the appellant Fairhurst for having on September 20, 1910, at 104, Winwick Street, Warrington, sold by retail certain beer for the retail sale of which he was required to take out a licence under the Finance (1909-10) Act, 1910 (1), without having taken out such licence.

(1) Finance (1909-10) Act, 1910, s. 43: "There shall be charged, levied, and paid on the licences for the manufacture or sale of intoxicating liquor specified in the First Schedule to this Act, the duties of excise specified in that schedule, and the provisions expressed in that schedule to be applicable to any such licences shall have effect with respect to those licences . . ."

Sect. 50, sub-s. 3: "If any person sells by retail any intoxicating liquor, for the retail sale of which he is required to take out a licence under this Act, without taking out such a licence, he shall be liable in respect of each offence, at the election of the Commissioners, either to an excise penalty of fifty pounds, or to an excise penalty equal to treble the amount of full duty."

Sect. 52: "In this Part of this Act—

"The expression 'beer' includes ale, porter, spruce beer, black beer, and any other description of beer, and any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time is found to contain more than two per cent. of proof spirit;"

Sect. 92: "All the powers, provisions, regulations, and directions contained in any Act relating to excise duties or licences, or to penalties or forfeitures under Excise Acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the excise duties charged by and the excise licences mentioned in this Act, so far as the same are applicable and are consistent with the provisions of this Act, as fully and

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At the hearing of the information the following facts were proved or admitted before the justices:—

1. The purchase and sale of the "beer."
2. The exhibition of the following advertisements in the shop:—

"The ales and stouts which are offered to the public on these premises are manufactured at about the same strength as ordinary ales and stouts guaranteed free from chemicals and to contain no preservatives. H. Finlay, Phoenix Brewery, St. Helens."

"Finlay's ales and stouts brewed from best malt, Kent and Worcester hops. Ale $1\frac{1}{2}d.$ per pint. Stout $2d.$ per pint. To be consumed on or off the premises."

3. That duty was paid on all beer brewed at the Phoenix Brewery, St. Helens.

4. That on analysis the beer had a gravity of 1040·1, the ordinary gravity of beer, and it contained 2 per cent. of proof spirit. It was manufactured from liquid glucose and hops and

effectually as if the same had been herein specially enacted with reference to the said duties and licences."

Sect. 96, sub-s. 6: "Part VI. of this Act, so far as it relates to duties of Customs, shall be construed together with the Customs Consolidation Act, 1876, and the Acts amending that Act, and Parts II. and VI. of this Act, so far as they relate to duties of Excise, shall be construed together with the Acts which relate to the duties of Excise and the management of those duties."

FIRST SCHEDULE.

EXCISE LIQUOR LICENCES.

C.—RETAILERS' LICENCES.

1. On-Licences.

Licence to be taken out annually by a retailer of	Duty.	Corresponding existing Licence.
2. Beer (beerhouse licence).	"A duty equal to a third of the annual value of the licensed premises, subject" to a certain minimum duty.	Licence on which duty is payable under 43 & 44 Vict. c. 20, s. 41.
.	.	.

was fermented with yeast. In colour, appearance, and taste it was exactly like ordinary beer.

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On the part of the appellant it was contended :

That the beer was not fermented with yeast, but a small quantity of fermented liquor was used.

That it was not proved that the liquor sold contained more than 2 per cent. of proof spirit, and that therefore the same was not beer or an excisable substitute therefor within the definition contained in the first clause of s. 52 of the Finance (1909-10) Act, 1910, and that the clause must be read as a whole and not be sub-divided.

That even if the same were beer within the meaning of the clause it was not proved that there was a sale by retail of an intoxicating liquor for which a licence was required ; that the liquor was not intoxicating, and that it was essential to the conviction that the liquor should be intoxicating.

That there were no words in the Finance (1909-10) Act, 1910, which required the appellant to take out a licence to sell the liquor he sold.

On the part of the respondent it was contended :

That the "beer" was beer within the meaning of the first clause of s. 52 of the Finance (1909-10) Act, 1910, and therefore an excise licence was required for the sale of the same.

That the clause could be sub-divided and that the beer sold came within the following words:—"The expression 'beer' includes ale, porter, spruce beer, black beer, and any other description of beer."

The justices were of opinion that the "beer" so sold was beer within the meaning of the first clause of s. 52 of the Finance (1909-10) Act, 1910, and that therefore it was necessary to take out an excise licence for the sale of the same.

That the clause could be sub-divided.

That *Howorth v. Minns* (1) did not apply, and accordingly they convicted the appellant.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

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J. R. Atkin, K.C., and G. C. Rees, for the appellant. The liquor which was sold was made under a process patented by the inventor. It was not beer, nor did it contain more than 2 per cent. of proof spirit. It was therefore not beer within the definition contained in s. 52 of the Finance (1909-10) Act, 1910. The information was laid under s. 50, sub-s. 3, which presupposes that there is a liability upon the appellant under the Act to take out a licence. Even if the appellant had sold ordinary beer he would not be liable to any penalty under s. 50, sub-s. 3, as there is nothing in the Finance (1909-10) Act, 1910, which requires him to take out a licence, and the information was laid only under that Act. Therefore upon this information that Act can alone be looked at, and for the purpose of relying upon any other statute the information is bad in form.

The liquor was not beer inasmuch as malt was not one of its constituents. In order that a liquor may be beer it must be made with malt. Nor did it contain more than 2 per cent. of proof spirit. Therefore it was not within the definition of "beer" contained in s. 52 of the Finance (1909-10) Act, 1910. That definition is compounded of two definitions. The first part of it down to and including the words "and any other description of beer" is taken from s. 2 of the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20); the second part is taken from s. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51). The liquor sold by the appellant is not within the first part of the definition because it contains no malt: *Leah v. Minns* (1); and it is not within the second part because it does not contain more than 2 per cent. of proof spirit. *Howorth v. Minns* (2) is distinguishable because the liquor which was under consideration in that case contained more than 2 per cent. of proof spirit. In order that liquor may be "beer" within the definition it must either be beer properly so called, i.e., made with malt, or it must be sold as a description of beer, and it cannot be sold as a description of beer unless it contains more than 2 per cent. of proof spirit. The only other provisions in the Finance (1909-10) Act, 1910, material to the present case are ss. 43, 49, and the First Schedule, head C, and the general

(1) (1883) 47 J. P. 198.

(2) 51 J. P. 7.

result is that there is no section in the Act which shews that a licence to sell this liquor must be taken out. The only offence with which the appellant could be properly charged under s. 50, sub-s. 3, of the Finance (1909-10) Act, 1910, is that of selling intoxicating liquor without a licence required by the Act, and in order to convict him it would be necessary to shew that this liquor is intoxicating liquor. The information was wrongly laid, therefore, both technically and in substance.

Sir Rufus D. Isaacs, A.-G., and *Daldy*, for the respondent. It is clear from s. 92 and s. 96, sub-s. 6, of the Finance (1909-10) Act, 1910, that the effect of the Act is to re-enact all the existing provisions contained in any Act with regard to excise licences. The Act leaves the statutory obligations untouched but raises the amount of duties payable. The justices found as a fact that the liquor was beer, and as there was ample evidence on which they could so find, it follows that the liquor is brought within the definition of "beer" in s. 52 of the Act of 1910.

LORD ALVERSTONE C.J. The appellant was summoned under s. 50, sub-s. 3, of the Finance (1909-10) Act, 1910, for having sold by retail certain beer, for the retail sale of which he was required to take out a licence under the Act. On behalf of the appellant, Mr. Atkin has contended that the Finance (1909-10) Act, 1910, does not contain any requirement that a licence should be taken out, and no doubt that is correct. But the answer to that contention is that under the scheme of the Finance Acts the obligation to take out a licence is not to be looked for in those Acts, but they contain a description of the article in respect of which duty is to be paid and the scale of duty upon that article. Supposing, for instance, that there is included in some Finance Act an article by name which has previously not been the subject of any duty, it can be included in the way in which it has been done in previous Acts, namely, by altering the definition of the particular taxable or excisable article in an earlier Act. The Inland Revenue Act, 1880, and the Customs and Inland Revenue Act, 1885, are a very good illustration of that method of legislation. Sect. 2 of the Inland Revenue Act, 1880, contained the words "Beer"

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includes ale, porter, spruce beer, and black beer, and any other description of beer." Sect. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1885, extended that meaning of the word "beer" by saying that "The term 'beer' in the Inland Revenue Act, 1880, shall be construed to extend to any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time shall be found to contain more than two per cent. of proof spirit." When making that alteration the Legislature did not expressly enact that a licence should be required to be taken out in respect of a new article. It treated the licensing laws and the obligation to take out a licence under them as existing, and altered the amount of the duty, and the article in respect of which duty was payable under the Inland Revenue Act, 1880. By keeping in view the distinction between a Licensing Act and a Finance Act, a complete answer is afforded to the point made by Mr. Atkin on behalf of the appellant, when he said quite truly that there is nowhere in the Finance (1909-10) Act, 1910, any provision imposing an obligation to take out a licence. The obligation is not imposed in terms, but the Act assumes it. In all probability, if the ingenuity of counsel in arguing such a case as this had been foreseen, instead of the words "for . . . which he is required to take out a licence under this Act" the words "for . . . which he is required to pay a duty under this Act" would have been used in s. 50, sub-s. 3. Those words express the real meaning of the sub-section. Sects. 92 and 96 of the Act of 1910 shew that the existing licensing law is kept in force. Sect. 92 shews that the Act enlarged possibly the number of articles to be included in respect of which duty was payable and increased the amount payable. Sect. 96, sub-s. 6, is to the same effect. It incorporates, for the purpose of the Act, the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), and the Acts amending it. A further answer to the point, if any further answer is necessary, is contained in the First Schedule, head "C.—Retailers' Licences. I.—On-Licences," of the Finance (1909-10) Act, 1910. Clause 2 of that head, refers to the "beer (beerhouse licence)," the duty payable, and the "licence on which duty is

payable under 43 & 44 Vict. c. 20, s. 41," i.e., the Inland Revenue Act, 1880. These provisions make it quite plain that what was done under the Finance (1909-10) Act, 1910, was to increase the amount of duty and possibly to enlarge the number of articles in respect of which duty was to be charged. I use the word "possibly" because the first clause of s. 52 of the Act of 1910, which contains the definition of "beer," is only a re-enactment of the combined definition of beer contained in the Inland Revenue Act, 1880, and the Customs and Inland Revenue Act, 1885. In my judgment, therefore, the objection taken to the form of the information upon the ground that there is no section in the Finance (1909-10) Act, 1910, requiring a licence to be taken out by the appellant fails. The information upon which he was summoned charged him with selling without a licence an article which having regard to the terms of the Finance (1909-10) Act, 1910, he could not lawfully sell without a licence.

The next point made on behalf of the appellant was that the article sold by him was not beer because it did not contain more than 2 per cent. of alcohol. But in my judgment it is impossible to say, upon the evidence which was before the justices, that they were not entitled to find that the article sold was beer. It was offered for sale as "ales and stouts." It was said to be "brewed from the best malt, Kent and Worcester hops" and it is a liquid or beer on which duty has been paid by the brewers. In the present state of the law, having regard to the burdens on the licensed trade, which are very heavy, brewers would not pay duty on beer if they could properly escape payment. The liquor was found on analysis to contain 2 per cent. of proof spirit. On behalf of the appellant it is said that it was not fermented with yeast, but that only a small quantity of fermented liquor was used, and that it was not proved that the liquor sold contained more than 2 per cent. of proof spirit. But there is an express finding of the justices that "We were of opinion that the 'beer' so sold was beer within the meaning of the first clause of s. 52 of the Finance (1909-10) Act, 1910." It is therefore not open to the appellant to contend that there is any confusion in the finding of the justices—that they have not made it clear whether they meant to find that it

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was beer or only that it was a substitute for beer, or, to adopt the words of the Act, “a description of beer which is found to contain more than two per cent. of proof spirit.”

It is quite plain that the justices thoroughly understood this case. They state in the case that they were of opinion that the first clause of s. 52 of the Finance (1909-10) Act, 1910, which contains the definition of the expression “beer,” could be sub-divided. They then state that they were of opinion that the decision in *Howorth v. Minns* (1) did not apply, and I appreciate their reasons for making that statement. In order to bring the present case within *Howorth v. Minns* (1) it must be shewn that there is more than 2 per cent. of alcohol in the liquor, and the justices therefore said that that decision was not material to the present case. They came to the conclusion in fact that it was beer within the earlier words of the sub-divided clause, if I may so call it. Having regard to *Leah v. Minns* (2) and *Howorth v. Minns* (1) the matter seems reasonably plain. In *Leah v. Minns* (2) it was thought—whether rightly or wrongly I do not know—that the liquid which was under consideration in that case was not beer within words which are the same as those in the first part of the first clause of s. 52 of the Finance (1909-10) Act, 1910, namely, “the expression ‘beer’ includes ale, porter, spruce beer, black beer, and any other description of beer.” In *Howorth v. Minns* (1) the judges had to consider the effect of the words in the second part of the clause, namely, “any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time is found to contain more than two per cent. of proof spirit.” They had to consider whether a liquor called “Summers’ botanic beer,” which in fact contained more than a certain amount of alcohol, was beer within the meaning of that part of the clause. But in the present case the justices have excluded the consideration of the question of the amount of alcohol the liquor contains, and they have found as a fact that it was “beer” within the first part of the distributive words (as I will call them) of the clause. In my judgment, therefore, we cannot

(1) 51 J. P. 7.

(2) 47 J. P. 198.

possibly say that the justices were wrong in coming to the conclusion that this liquor was in fact beer.

The appeal fails and must be dismissed.

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HAMILTON J. Sect. 52 of the Finance (1909-10) Act, 1910, is a definition section only in a parliamentary sense. It does not define, it describes; and in order to decide whether a particular liquid is "beer" within the meaning of that expression as fixed by the first limb of the sentence in the first clause of s. 52, the decision of a question of fact is necessarily involved. The clause is descriptive and was enacted so as to include various things into which the word "beer" does or does not enter as part of the description. But the article has, upon the facts, to be brought within the genus "beer." The justices have, in my opinion, found as a fact that this liquid was a "description of beer" within the meaning of the first part of the first clause of s. 52. Had they done otherwise they must have misconstrued the section and brought it within the words a "liquor . . . sold as a description of beer" (that is to say, not being within the genus "beer") "or as a substitute for beer" in the second part of the clause. They would then have made an error in construing the section, because they would have disregarded the additional qualification as to the amount of alcohol that such description or substitute must contain. They had ample materials on which to find that the liquor was a "description of beer" within the meaning of the first part of the clause. I agree that the mere circumstance that a person sells a fluid under a false description as beer is not an estoppel which prevents him from proving what the fluid really is, but it is at least evidence for the justices as to what it in fact is. Unless it can be said that the effect of *Leah v. Minns* (1) is to prevent the justices from finding this liquid to be in fact beer, the matter is concluded by their finding of fact. Now *Leah v. Minns* (1) was a decision on the words of the Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), and I do not think that it can have been the intention of the Legislature in 1910, merely because the words were re-enacted, to re-enact the word "beer" only

(1) 47 J. P. 198.

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in the sense in which it was used in 1834. Times have changed and so has science since 1834; and in the absence of any words making it clearer than the Finance (1909-10) Act, 1910, does, that in 1910 the Legislature intended to use the word "beer" in the sense in which it was used in the Beerhouse Act, 1834, I think that we ought to infer that the word is used in the sense which it has at the present day.

Upon the other point I think that s. 96, sub-s. 6, of the Finance (1909-10) Act, 1910, compendiously but sufficiently brings the licences which it is necessary to take out for the sale of these liquors within the purview of s. 50, sub-s. 3, so as to make the licence which was required for the sale of beer a licence which in the words of s. 50, sub-s. 3, the appellant was "required to take out under this Act." I therefore agree that the appeal fails.

BANKES J. I quite agree, and I only desire to add a few words with regard to the second point made by Mr. Atkin on behalf of the appellant, which was, in the language of the case stated by the justices, "That there are no words in the Finance (1909-10) Act of 1910 which require the appellant to take out a licence to sell the liquor which he sold." I do not agree with that contention. Speaking for myself I am of opinion that a careful scrutiny of the Act of 1910 shews that it does contain such a provision, because in my view the words "for the retail sale of which he is required to take out a licence under this Act" in s. 50, sub-s. 3, which creates the offence, refer to an excise licence as opposed to the justices' licence. Then by s. 43 it is provided that "There shall be charged, levied, and paid on the licences for the manufacture or sale of intoxicating liquor specified in the First Schedule to this Act, the duties of excise specified in that schedule" Those words clearly apply to the amount chargeable. The section continues: "and the provisions expressed in that schedule to be applicable to any such licences shall have effect with respect to those licences." The First Schedule, head C, is entitled "Retailers' Licences," and under the sub-head "Licence to be taken out annually by a retailer of" is mentioned amongst other things "beer

(beerhouse licence).” In my judgment the words “licence to be taken out annually by a retailer of” are part of the statute and supply the requirement that the licence is to be taken out by a person who is a seller of any excisable articles.

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Appeal dismissed.

Solicitor for appellant: *A. T. Plant, for W. Hutchen, St. Helens.*

Solicitor for respondent: *Solicitor to His Majesty's Customs and Excise.*

J. E. A.

[IN THE COURT OF APPEAL.]

In re BRADLEY AND ESSEX AND SUFFOLK ACCIDENT
INDEMNITY SOCIETY.

C. A.
1911
Nov. 27 ;
Dec. 20.

*Insurance — Accident — Workmen's Compensation — Conditions Precedent —
Condition as to keeping Wages Book.*

The claimant effected a policy of insurance with an insurance society against liability under the Workmen's Compensation Act, 1906. He only employed one person, his son, who was paid 75*l.* a year. The son having been injured in the course of his employment, the claimant had to pay him compensation under the Act. The society refused to pay on the ground of non-compliance with the following condition in the policy (which declared it and other clauses to be conditions precedent to the society's liability under the policy):—"The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during each period of insurance. The name of every employee and the amount of wages, salary, and other earnings paid to him shall be duly recorded in a proper wages book. The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance within one month from the expiry of such period of insurance, and, if the total amount so paid shall differ from the amount on which premium has been paid, the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society, as the case may be." No wages book was kept by the claimant:—

Held by Cozens-Hardy M.R. and Farwell L.J. (Fletcher Moulton L.J. dissenting), affirming the decision of Bray J., that the claimant was entitled to indemnity by the society from liability to pay compensation, as the sole object of the condition was to provide for the adjustment of

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premiums, and that compliance with the clause was not a condition precedent to liability.

Per Fletcher Moulton L.J.: As the policy clearly and unmistakably pronounced the clause to be a condition precedent, there was no reason why it should be declared to be otherwise, and the society, therefore, was not liable.

CLAIM under an employers' liability insurance policy.

John R. Bradley, the claimant, a currier and small farmer, of Penrith, on March 25, 1908, sent to the defendant society a proposal filled up and signed by him on the printed form supplied by the society for "Employers' Insurance—Complete Indemnity under the Workmen's Compensation Act, 1906; Employers' Liability Act, 1880; Fatal Accidents Act, 1846; and Common Law." The form contained a "Schedule (All persons employed must be included)," and in this Bradley stated the estimated number of his employees as "male," "1 to 2," and the "estimated total annual wages and salaries and other earnings" as 75*l.* The rate per cent. was stated to be 10*s.* At the foot of the proposal there were the following printed words: "I . . . the undersigned . . . desire to effect an insurance in terms of the policy to be issued by" the society "against my . . . statutory and common law liability as above mentioned, and I . . . agree to render, at the end of each period of insurance, a statement in the form required by the company of all wages actually paid, and to pay premium on the wages paid in excess of the amount estimated above . . . and I . . . agree that this declaration shall be the basis of the contract between me . . . and the company."

The society, in response to the proposal, gave the claimant a policy of insurance, dated April 1, 1908, which recited that the claimant (thereinafter called "the insured") had made to the society "a written proposal and declaration dated March 25, 1908, containing certain particulars and statements which it is hereby agreed shall be the basis of this contract and be considered as incorporated herein," and witnessed that "in consideration of the payment to the society of the above mentioned premium (which premium is subject to adjustment as hereinafter provided) for the following indemnity from March 28, 1908, to April 1, 1909, both dates inclusive. It is hereby agreed that if at any time during

the said period, subject to the receipt of premium as provided in the conditions hereunder, and during the continuance of this policy by renewal, any employee in the insured's immediate service shall sustain any personal injury by accident while engaged in the service of the insured and in case the insured shall be liable to make compensation for such injury under the Workmen's Compensation Act, 1906 the society shall indemnify the insured against all sums for which the insured shall be so liable Provided always that the due observance and fulfilment of the conditions of this policy, which conditions are to be read as part of this policy, shall be a condition precedent to any liability of the society under this policy."

Then followed a number of "Conditions" under that heading. By condition 1. every notice was to be in writing delivered at an office of the society. Condition 2 referred to notice to the society of any accident covered by the policy, and any claim in respect thereof.

Conditions 3 to 7 were as follows :

Condition 3. "The insured shall not incur any expense, litigation or otherwise, or make any payment, settlement or admission of liability in respect of any injury for which the society shall be liable under this policy without the written authority of the society. The society shall, in respect of anything insured under this policy, be entitled to use the name of the insured, including the bringing, defending, enforcing, or settling of legal proceedings for the benefit of this society. The insured shall give all necessary information and assistance, and forward all documents to enable the society to settle or resist any claim as the society may think fit."

Condition 4. "The insured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations."

Condition 5. "The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries, and other earnings, paid to employees by the insured during each period of insurance. The name of every employee and the amount of wages, salary, and other earnings

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paid to him shall be duly recorded in a proper wages book. The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance within one month from the expiry of such period of insurance; and, if the total amount so paid shall differ from the amount on which premium has been paid, the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society, as the case may be."

Condition 6. "Unless specifically included by endorsement hereon, the indemnity granted under this policy, or any renewal thereof, shall not apply to the insured's liability to employees in the employ of sub-contractors to the insured."

Condition 7. "The society shall not be liable in respect of any accident or disease occurring before the actual receipt of the premium by the society or its authorised agents, or in respect of any accident or disease occurring after the date of expiry and before the actual receipt of the premium for renewal."

Condition 8 provided that any dispute between the insured and the society in respect of the policy, or any claim, matter or thing, or liability arising or alleged to have arisen thereunder, should be referred to arbitration, and that an award in favour of the insured in such an arbitration should be "a condition precedent to any right of action against the society" in respect of such dispute.

The only employee of the claimant was his son, whose wages were 75*l.* a year. On February 15, 1909, the son, while chopping wood, was injured, and the claimant had to pay him 6*s.* a week as compensation under the Workmen's Compensation Act, 1906.

The claimant claimed the amount from the society, but the society refused to pay on the ground that the claimant had not complied with condition 5 by keeping a wages book.

The policy was renewed on April 1, 1909, a receipt for the premium being given on April 5.

The claim having been referred to arbitration, the arbitrator by his award found that the society was liable to indemnify Bradley against the sum of 6*s.* a week from the date of the accident, subject to the opinion of the Court on certain questions

stated as part of the award in the form of a special case, namely:

(1.) Was compliance with condition 5 a condition precedent to the liability of the society under the policy?

(2.) Was there on the facts a compliance with that condition?

(3.) Was there on the facts a waiver by the society of compliance with the condition?

The arbitrator found as a fact that the claimant had never kept any wages book.

Bray J. held that neither condition 5 nor any part of it was a condition precedent, and that the claimant was entitled to recover, although there had been no compliance with the condition and it had not been waived; and he gave leave to appeal.

The society appealed, and the appeal was heard on November 27, 1911.

Ernest Pollock, K.C., Sims Williams, and T. C. P. Gibbons, for the appellants. The arbitrator has found and it is admitted that the claimant never kept a wages book. He has therefore not complied with condition 5. By the terms of the proviso in the policy the fulfilment of this and the other conditions is to be "a condition precedent to any liability of the society" under the policy; and the society is not liable to indemnify the claimant. The decision is important to the society, as it has issued many policies in a similar form and wishes to protect itself against fraudulent claims.

Bray J. thought that if the condition as to a wages book had been intended to be a condition precedent, it would have been put in the proposal for a policy; but it is submitted that it is immaterial whether the condition is in the proposal or the policy, and that if it was not meant to be a condition precedent the proposal was the document which should have contained the condition.

The learned judge thought that the one object of the clause was that of adjustment of premium. That was one object, but that could have been attained by stating the amount of wages, whereas the clause requires "the name of every employee" to be inserted in the wages book, shewing that another object of the

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C. A. clause was to prevent claims being made in respect of persons
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The learned judge thought that conditions 1 and 2 might be properly called conditions precedent, but it is submitted that condition 3 is also a condition precedent, and that the policy means what it plainly says, that the fulfilment of all the conditions is to be a condition precedent to liability. [They referred to *In re Coleman's Depositories, Ltd. and Life and Health Assurance Association* (1) and *London Guarantie Co. v. Fearnley*. (2)]

Eustace Hills, for the respondent. The decision of Bray J. was right. Condition 5 is not a condition precedent, but merely a clause as to the adjustment of premium. This is shewn by the words in the body of the policy, "which premium is subject to adjustment as hereinafter provided." *In re Coleman's Depositories, Ltd. and Life and Health Assurance Association* (1) is really a decision in the respondent's favour. Several of the conditions and parts of condition 5 are certainly not conditions precedent. It does not matter what the conditions are called; their words must be considered to see what kind of conditions they are. [He referred to *General Accident Assurance Corporation v. Day* (3) and Williams' Notes to Saunders' Reports, 6th ed., 320 (b), note 1.]

Ernest Pollock, K.C., in reply.

Cur. adv. vult.

1911. Dec. 20. COZENS-HARDY M.R. This is an appeal from a decision of Bray J., who has held that a particular condition in a policy is not a condition precedent.

The plaintiff, Bradley, is a currier and small farmer. His only employee was his son, who met with an accident on February 15, 1909, in respect of which he has obtained compensation from his father at the rate of 6s. per week. The propriety of this compensation is not questioned. The father claims under the policy which he effected on March 31, 1908. The proposal, which is to be "considered as incorporated in the policy," stated the estimated number of employees as one to two, and their total

(1) [1907] 2 K. B. 798. (2) (1880) 5 App. Cas. 911.

(3) (1904) 21 Times L. R. 88.

estimated wages at 75*l*. It gave other particulars, upon which no question arises, and at the end there is a statement that Bradley desired to effect an insurance "in terms of the policy to be issued" by the society against his statutory and common law liability, and he agreed to render at the end of each period of insurance a statement in the form required by the company of all wages actually paid and to pay premium on the wages paid in excess of the amount estimated above. The premium paid was 10*s*. The policy itself refers to the proposal, which is agreed to be the basis of the contract, and it witnessed that in consideration of the payment to the society of 10*s*. premium—which premium "is subject to adjustment as hereinafter provided"—for indemnity from March 28, 1908, to April 1, 1909. After stating the extent of the indemnity, which includes claims under the Workmen's Compensation Act, there is a proviso in the following terms: "Provided always that the due observance and fulfilment of the conditions of this policy, which conditions are to be read as part of this policy, shall be a condition precedent to any liability of the society under this policy." Then follow eight conditions.

Now it is perfectly clear that some of these so-called conditions are not and cannot be conditions precedent, although some of them may be and are conditions precedent. Nos. 1 and 2, dealing with notices, may be conditions precedent. No. 3, so far as any meaning can be attributed to it, seems to me not to be a condition precedent. The same remark applies to Nos. 4, 6, and 7. The question in this appeal, however, turns upon condition 5. This is obviously that which is referred to in the policy itself in the words "subject to adjustment as hereinafter provided." The first sentence is not a condition precedent. That says "The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during each period of insurance." The third sentence also is not. It says "The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance, within one month from the

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expiry of such period of insurance, and if the total amount so paid shall differ from the amount on which premium has been paid, the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society, as the case may be." The second sentence is in the following words: "The name of every employee, and the amount of wages, salary, and other earnings paid to him, shall be duly recorded in a proper wages book."

It is found by the arbitrator, who has made his award in the form of a special case, that this small farmer did not keep any wages book, and the question is whether this suffices to relieve the society from all liability, or whether it is merely a part of the provision for adjusting the premium and evidencing the amount of wages in respect of which premium was payable. Bray J. has held that the policy-holder is not disentitled to claim by reason of the omission to keep a proper wages book, and I agree with his decision.

I think the fifth condition is one and entire, and it is to my mind unreasonable to hold that one sentence in its middle is a condition precedent while the rest of the condition cannot be so considered. A policy of this nature, in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder, and it seems to me unreasonable to hold that the office can escape from all liability by reason only of the omission to duly record in a proper wages book the name of every employee and the amount of his wages. This is only required for the purpose of the statement which, by the proposal, the insured agreed to render at the end of each period of insurance. In my opinion, it ought not to be regarded as in any sense a condition precedent, and it follows that, in my opinion, the appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. In this matter the claimant, John Rogers Bradley, entered into a policy of insurance with the appellants against his liability under the Workmen's Compensation Act. An accident arose within the meaning of the policy, and the claimant has had to pay to the injured workman 6s. a week under the provisions of the Act. He made a claim for

indemnity against the society, who disputed the claim, and the matter was, in accordance with the provisions of the policy, referred to arbitration. At the request of the parties the arbitrator found his award in the form of a special case, which, for the purposes of this appeal, may be taken to award to the claimant the indemnity asked for subject to the opinion of this Court on one question, namely, was compliance with clause 5 of the policy a condition precedent to the liability of the society under the said policy?

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In my opinion, this question is purely a question of construction and is unaffected by the special facts of the case. But it may be well to state here one or two facts which were referred to in the arguments. They are as follows: The claimant signed in the first place a proposal for the policy, in which he stated that the estimated number of employees was one to two. He was a currier and farmer, and at the time of signing such proposal and during all material times he only employed one workman, namely, his son. The son's wages were 1*l.* a week and board. In chopping wood the son lost his hand. No question arises about the injury or the amount of the compensation to be paid in respect of it.

The policy (which incorporates the proposal) is framed on the following lines. The indemnity granted by it is a complete indemnity under the Workmen's Compensation Act, 1906, the Employers' Liability Act, 1880, the Fatal Accidents Act, 1846, and common law, and applies to all the employees in the assured's immediate service. The premium is 10*s.* per cent. on the total wages paid. In the proposal the applicant inserts an estimate of the total annual wages and salaries and other earnings. On or before the issue of the policy the insured pays to the society 10*s.* per cent. on the amount of such estimate, and at the end of the year the true premium is arrived at by adjustment. This adjustment is effected by taking the total wages, &c., actually paid during the year to the employees of the insured. Ten shillings per cent. is taken upon this total of wages actually paid, and the difference between it and the premium paid on entering into the policy is paid to or by the society as the case may be, the result being that the actual premium is 10*s.* per cent.

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on the actual amount of wages paid during the year. It is evident, therefore, that it is of vital importance to the society that all payments of wages should be included in the total of wages actually paid upon which the adjustment is made. Accordingly clause 5 (upon the interpretation of which the present case turns) is inserted in the policy as one of the conditions. These conditions are subject to a proviso which is in the following words: "Provided always that the due observance and fulfilment of the conditions of this policy, which conditions are to be read as part of this policy, shall be a condition precedent to any liability of the society under this policy." Clause 5 reads as follows: "The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during each period of insurance. The name of every employee and the amount of wages, salary, and other earnings paid to him shall be duly recorded in a proper wages book. The insured shall at all times allow the society to inspect such books and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance within one month of the expiry of such period of insurance, and if the total amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society, as the case may be."

There is no ambiguity in the language of this clause, and it is found by the arbitrator, and is an admitted fact in this case, that the claimant kept no record whatever of the wages paid by him. If, therefore, the observation of this condition is a condition precedent to liability under the policy (as the language of the policy expressly declares to be the case), the society are entitled to our judgment. But on certain grounds, which I shall presently examine, the learned judge has found that the parties did not intend the observance of the condition to be a condition precedent to liability under the policy, and has therefore given judgment for the claimant, and it is from this judgment that the present appeal is brought.

Before dealing with the main point it is necessary to get rid

of certain contentions which have been put forward during the argument, but which in my opinion have no real bearing on the question.

In the first place, much emphasis was laid on the fact that the claimant here was a currier and farmer employing only one, or at most two workmen. I cannot see what relevance that fact has. It might have some bearing on the interpretation of the phrase "duly recorded in a proper wages book," inasmuch as a proper wages book for a large employer might be of a different kind to a proper wages book for a small employer. But in the present case it is found by the arbitrator that he did not perform this condition at all. No wages book was kept and no entry made, so that, however leniently the Court might be inclined to construe those words in the case of a small employer, it is impossible to say that he performed the condition. It is for this reason that I am of opinion that the case before us is a pure question of law, namely, the construction of the contract. And if we decide that the performance of this obligation is not a condition precedent in the present case, that ruling will apply to every policy of the society.

It was further sought to base an argument on the fact that there is no reference to this condition in the proposal form which was signed by the claimant. That is true, but I fail to see what bearing that has on the question before us. That proposal was only a proposal for a policy in the form used by the society. It did not purport to contain the conditions of the policy, and indeed it did not refer to any one of those conditions excepting the rendering of a statement in the form required by the company of all wages actually paid and the payment of premium on the excess over the estimate. It expressly states that signing the proposal form does not bind the applicant to complete the insurance. It is not, nor could it be, suggested that the applicant thought that the proposal form was the policy or included all its terms. But it is not necessary to enlarge on this point, because this is not a case in which the insured is disclaiming the policy as not being in accordance with that which he intended to enter into; he is himself claiming under the policy, and he cannot be allowed to

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I now come to the main question as to the due observance and fulfilment of clause 5 being a condition precedent to the liability of the society under the policy. It is clearly and unmistakably pronounced to be so in the policy itself, and I ask myself whether there is any reason why we should declare it to be otherwise. I can see none. The clause appears to me to be a most reasonable precaution necessary for the protection of the society and wisely made by it a condition precedent. By the scheme of insurance the premium is fixed not at the inception of the risk but after it is over, and the amount of the premium is calculated upon the total of the wages actually paid within the year. It follows that if there is any omission, either of persons employed or of wages paid to them, in calculating the adjustment, the society gets a diminished premium. By the time the adjustment has to be made the risk is over, and therefore it is directly to the interest of the insured to make such omissions. But if the insured is bound to keep a contemporary record of the names of his employees and the wages paid to them, there is no such temptation to him to fail in his duty, because the risk is not then over, and, as he wishes to be covered for all his employees, he necessarily has an interest in entering them as such at the time. It will be seen, therefore, that the duty of making contemporary records of the names of the employees and of the wages paid is a most valuable protection to the company against fraud or forgetfulness on the part of the insured. I may go further and say that it is in substance their only protection. It would be impossible for them actually to check the correctness of the statements as to the employees and their wages which are rendered to them by the insured at the end of the year, since they probably have many thousands of policies. But by making it a condition that all wages shall be duly recorded in a proper wages book, and that such wages book shall at all times be open to the inspection of the society, the latter has a really effective check upon the insured. It becomes much too dangerous to leave unrecorded the wages paid, and in this way the insured are spared the temptation of omitting to make records of wages paid

to persons with regard to whom the risk is over, such as persons taken on temporarily whose period of service has expired. To my mind a provision such as this is precisely correlative to a condition that notice of an accident shall be given as soon as practicable. The latter protects the society from unfounded claims of liability by putting it in the best position for testing the justice of the claims, and the former protects the society from loss on its premiums by providing that it shall have the best material for checking their correctness. And these two conditions are alike in another respect. However vital to the society their observance may be, they can only be rendered effective by stipulating that they shall be conditions precedent, i.e., that a plaintiff, in order to make good his claim, must aver and prove their performance down to the date of bringing the action. If they are merely independent obligations, the breach of which gives ground for a cross-claim in damages, they might as well be struck out of the policy, because from their nature it is impossible to establish the quantum of damage resulting from a breach. The condition therefore seems to me to be one of such a nature that it can be made, and would naturally be made, and by the language of the policy has expressly been made, a condition precedent, and, inasmuch as, *ex concessis*, it has not been performed in this case, I am of opinion that the liability of the society under the policy has ceased.

It remains to examine the arguments by which it has been sought to establish the contrary. It is said, and the learned judge has adopted the contention, that condition 5 is mixed up with a number of other conditions which cannot have been intended to be conditions precedent, and that accordingly we ought not to regard it as such. I confess that I am suspicious of such an argument. In the well-known case of *London Guarantie Co. v. Fearnley* (1) the House of Lords enforced the terms of a policy, much more open to objection on such a score than the present policy, holding that the stipulation that a certain condition should be a condition precedent must have full effect given to it. But for the purpose of the present case I am content to take the judgment of Lord

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Selborne, the dissentient judge in that case. With regard to the interpretation of language such as that in the present policy he says: "It is admitted, and it is undeniable, that some of the provisoes contained in the policy in this case are of a nature which makes it impossible that they should be conditions precedent to the liability of the company to pay the amount guaranteed, in the event of such a loss as is contemplated by the policy. The express declaration, therefore, that the policy is granted 'subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the said employer to recover under this policy,' can have no greater effect than this, that such of the subsequent provisoes as, according to their true intent and meaning (to be collected in the usual manner upon a sound construction of the whole instrument), may be restricted to things to be done on the part of the employer before any right of action accrues to him under the policy, are to be conditions precedent of the right to recover."

He therefore decides the question by considering whether the condition is such that, *ex natura*, it can be a condition precedent, and not by considering whether it is in company with others that cannot.

But the present policy, in my opinion, is free from reproach on the ground that there is a confusion between conditions precedent and subsequent. It is true that some of the conditions do not in their nature relate to time, and therefore can be neither conditions precedent nor conditions subsequent. This applies, for instance, to condition 6, which stipulates that the policy shall not apply to the insured's liability to the employees of sub-contractors, and to condition 7, which fixes precisely the period of time covered by it. But there are limitations of the policy, and their insertion in the list leads to no difficulty of interpretation and does not, in my opinion, affect in any way the status of the other conditions.

Great exception was taken in this connection to the first sentence of condition 5. To my mind it is properly there, as making it clear what are the premiums to which the remainder of the condition relates. It bears much the same relation to the latter part of condition 5 as condition 1 does to condition 2.

The one describes how the notice must be given which is made a condition precedent in No. 2.

The main ground on which the learned judge declined to consider clause 5 a condition precedent was that the clause was solely directed to ascertain the amount of the premium to be paid. With the greatest respect for his opinion I think he failed to realize the object of the clause. It is very much more than a question of arithmetic. As I have already pointed out, it is to secure substantially contemporaneous entries of payments of wages, from which it is true the arithmetical calculation of the premium would be made, but which are far more important from the point of view of the quality of the evidence which will be at the disposal of the society in the way of contemporary records. It is true that the condition does not state absolutely that the entries are to be made at the time, nor do I think that necessary. But the words "duly recorded in a proper wages book" are sufficient to ensure that the entries are made at or about the time of the payment. No one would say that prime entries were duly made in a trade book if they were not made in due course of business as the events happened.

The only other argument pressed upon us related to clause 3, which provides that the insured shall not incur any expense litigation or otherwise or make any payment settlement or admission or liability in respect of any injury for which the society shall be liable under this policy without the permission of the society. The clause is badly worded (and indeed I think that the word "of" is accidentally omitted after the word "expense"), and it is difficult to construe, but both of these matters seem to me immaterial on the question of whether it is or is not intended to be a condition precedent. To my mind the nature of such parts as are clear shews that it was intended to be a condition precedent. The society retains in its hands the right to dispute claims made upon the insured, and therefore, if the assured without its permission makes an admission of liability, the society is fairly entitled to protect itself from the liability so admitted. But, however this may be, I fail to see how the imprudence on the part of the insured in accepting a vaguely worded condition such as No. 3

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should affect the Court in giving full effect to the language of No. 5.

For these reasons I am of opinion that the appeal should be allowed and the action dismissed with costs here and in the Court below.

FARWELL L.J. Contracts of insurance are contracts in which uberrima fides is required, not only from the assured, but also from the company assuring. It is the universal practice for the companies to prepare both the form of proposal and the form of policy: both are issued by them on printed forms kept ready for use; it is their duty to make the policy accord with and not exceed the proposal, and to express both in clear and unambiguous terms, lest (as Fletcher Moulton L.J., quoting Lord St. Leonards, says in *Joel v. Law Union and Crown Insurance Co.* (1)) provisions should be introduced into policies which "unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written." It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed "*contra proferentes*" applies strongly against the company: *In re Etherington*. (2) It has been further held that if the proposal be in one form, and the office draws up the policy in a different form, varying the right of the assured, Courts of Equity would rectify the policy so as to make it accord with the proposal: *Collett v. Morrison* (3); *Griffiths v. Fleming* (4);

(1) [1908] 2 K. B. 863, 886.

(3) (1851) 9 Hare, 162.

(2) [1909] 1 K. B. 591.

(4) [1909] 1 K. B. 805.

and in cases like the present, where the proposal is "considered as incorporated" in the policy, the Court will, on construction of the two documents read together, give effect to the proposal as overriding the policy where they differ. These considerations are particularly applicable to insurances under the Workmen's Compensation Act; that Act has rendered it practically necessary for all who desire to avoid the risk of bankruptcy, and who cannot afford to be their own insurers, to insure. Tens of thousands of small shopkeepers with one assistant, lodging-house keepers and others with one "general," small farmers, tenants of small holdings and the like with one man, are driven to insure. They receive a printed form of proposal, and it is reasonable to assume that they read and rely on it, and they receive in exchange for the form so supplied to and required from them a policy which they are entitled to assume and do assume, in most cases without careful perusal of the document, to accord with the proposal form. It is, in my opinion, incumbent on the company to put clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefits of the insurance. It is contended that it is of the utmost importance to insurance companies that they should be able to defend themselves against frauds by inserting conditions precedent, such as keeping wages books, and the like. Be it so; there is no objection whatever to the insertion of such conditions, so long as the intending assurer has full and fair notice of them and consents to them. This can easily be done by stating them shortly in the proposal forms with the addition that payment may be refused if they or any of them are not complied with; but it is, in my opinion, scarcely honest to induce a man to propose on certain terms, and then to accept that proposal and send a policy as in accordance with it when such policy contains numerous provisions not mentioned in the proposal, which operate to defeat any claim under the policy, and all the more so when such provisions are couched in obscure terms. In the present case both proposal form and policy offend against both the requirements to which I have

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referred, and the form of policy is to my mind very objectionable. The insured is a currier and farmer who employs one man only, his own son. The condition precedent for non-performance of which the society claims to escape liability is the failure to keep a "proper wages book." The proposal form says nothing about keeping a wages book, but contains these words: "I agree to render, at the end of each period of insurance, a statement in the form required by the company of all wages actually paid and to pay premium on the wages paid in excess of the amount estimated above." There is no question here of actual payment of the wages: the arbitrator has found that the wages were paid; it is a perfectly honest claim. There is nothing in the proposal form to suggest to a man who employs one workman only the necessity of keeping a wages book at all, nor is there any evidence that it is usual or proper for a currier or farmer employing one man only to keep such a book: in the absence of evidence I decline to assume it, and all the more so because I feel sure that the contrary is the fact. Then I turn to the policy, and I find a provision that may be common, but is in my opinion most objectionable: the policy states that the due observance and performance of the conditions of this policy "shall be a condition precedent to any liability of the society under this policy." The policy then sets out in small print eight clauses, of which it is admitted that several are not conditions precedent, and some are not conditions at all. Clause 5 contains the provision relied on by the society: it is in the middle of a clause, the first and last provisions of which are clearly not conditions precedent. The first paragraph is not a condition at all, and the last is obviously subsequent, because the amount due on the policy may become due before the event happens, and Bray J. has held that the provision for keeping a proper wages book, inserted as it is in the middle of clause 5, cannot fairly be read as an independent condition precedent, but is merely machinery for that ascertainment and adjustment of premium which is mentioned in the proposal form. I agree with him, because I think that, reading the policy with the proposal form (in accordance with the provision in the form that the form is incorporated in the policy), and construing the policy

most strongly against the society, in the interests of honesty and fair dealing this is the better construction: any other construction would convict the society of having issued a tricky policy calculated to deceive and entrap the unwary and of insisting on the success of their devices. I think it is the duty of all insuring companies to state in clear and plain terms, as conditions precedent, those provisions only which are such, not to wrap them up in a number of clauses which are not conditions precedent at all; and I think further that it is their duty to call attention to such conditions in their form of proposal so as to make sure that the insurers understand their liabilities. *London Guarantie Co. v. Fearnley* (1), on which the appellants relied, was a decision on a particular clause in a particular policy, on which eight judges were evenly divided. It lays down no new principle and has no bearing on the present case. There is another ground on which also I think Bray J.'s judgment can be supported. The condition, if it be one, is to keep "a proper wages book": that must mean, in my opinion, "proper under the circumstances of the case and for the business or trade of the insurer." Take the case of a lodging-house keeper with one maid. I think it would be absurd to lay it down as a matter of law without evidence that it is proper or usual for such a woman to keep a wages book; and I think the same observation applies to a small farmer (even although he adds a currier's business to his farming) who employs his son as his only servant. I think Bray J. was right, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *G. F. Hudson, Matthews & Co., for Isaacs & Heath, Sunderland.*

Solicitors for respondent: *Nicol, Son & Co., for Cant & Fairer, Penrith.*

(1) 5 App. Cas. 911.

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[IN THE COURT OF APPEAL.]

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Dec. 12, 14.NORTHFIELD STEAMSHIP COMPANY v. COMPAGNIE
L'UNION DES GAZ.*Shipping—Charterparty—Construction—Demurrage.*

A charterparty provided that a steamer was to load a cargo at Sunderland, and proceed therewith to Genoa or Savona, as ordered, and there deliver her cargo alongside wharf ^{and}_{or} vessel ^{and}_{or} craft as ordered; and that the cargo was to be taken from alongside by consignees at port of discharge at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, "provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day. . . . Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage."

The steamer was ordered to Savona, and arrived and was moored at the Punta, inside the port and harbour, on September 22, 1909, when she gave notice of her readiness to unload. All the berths alongside wharves were occupied by other vessels, and the steamer could not get to a berth alongside the wharf until September 25, when unloading commenced.

By reason of certain rules made by the shore labourers, and recognized and sanctioned by the port authorities, shore labourers would not discharge vessels until they were in berth alongside a wharf, and, further, cargo was not brought to the rail by the ship's crew but by the shore labourers. These rules had for several years been part of the regulations of the port of Savona. The plaintiffs, the owners of the steamer, in an action against the defendants, who had chartered the vessel and were the shippers of the cargo, contended that time began to run as from the notice of September 22 and claimed demurrage, while the defendants contended that no demurrage was payable on the grounds (1.) that the steamer was not an arrived ship and ready to unload until berthed at the wharf, and (2.) that, the delay being due to the rules of the port, the case was within the clause as to strikes, &c. :—

Held, affirming the decision of Hamilton J., (1.) that time commenced to run when the steamer was ready to unload "whether in berth or not" on notice being given, and (2.) that the delay caused by the regulations was not a matter ejusdem generis with strikes, lock-outs, and civil commotions, and, therefore, was not within the strike clause of the charterparty; and that the defendants were liable.

THE plaintiffs were the owners of a steamer called the *Nessfield*. The defendants by a charterparty dated August 25,

1909, chartered the steamer for a voyage from Sunderland to Genoa or Savona, as ordered, with a cargo of coal, of which the defendants were the shippers. The charterparty was headed "Chamber of Shipping North-East Coast (Tees to Berwick) Coal Charters, 1896, exclusive of Coasting (Elbe to Brest included) and all Ports North of the Elbe and the Baltic Trades." By clause 1 the steamer was to proceed to Sunderland, and there load a complete and full cargo of coal, and being so loaded "therewith proceed, with all possible dispatch, to Genoa or Savona as ordered on signing bills of lading, and there deliver her cargo alongside any wharf ^{and}_{or} vessel ^{and}_{or} craft as ordered, or so near thereunto as she can safely get where she can safely deliver, always afloat, but if required to shift, the expenses of so doing to be paid by consignees, and the time to count; on being paid freight at the rate of 5s. 6d. per ton"

Clause 8 was as follows: "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer, at the rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day (or pro rata for part thereof). Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage."

The steamer was ordered to proceed to Savona; and it was admitted (1.) that "she arrived off Savona Harbour at 1.30 A.M. on September 22, 1909, and had arrived and was moored inside the port and harbour of Savona at 7.30 A.M. on the same day," and that, "the berths alongside the wharves being all occupied by other vessels, the *Nessfield* was moored at a place called 'the Punta'; (2.) that "the *Nessfield* was ordered by the defendants to discharge in a berth alongside a wharf, but none was available until 9.30 A.M. on September 25, 1909, when the *Nessfield* was berthed"; (3.) that "it is the recognized course of business at Savona that vessels are not discharged until they are in berth

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C. A. alongside a wharf, and that shore labourers will only work in
 1911 connection with the discharging of vessels when they are in
 NORTHFIELD berth alongside a wharf. Further, it is not the practice at
 STEAMSHIP Savona for the ship's crew to be employed to bring the cargo to
 COMPANY the rail. Shore labourers are always employed by the ship to do
 v. this work, and they will not do it till the ship is berthed along-
 COMPAGNIE side a wharf. If the ship had employed her own crew to bring
 L'UNION the cargo to the rail, either at the Punta or alongside the wharf,
 DES GAZ. the consignees would have been unable, having regard to the
 aforesaid recognized course of business and practice, to get
 labour to take the cargo from the rail"; (4.) "Unless the facts as
 to labour above set out constitute a want of readiness to unload
 on the part of the *Nessfield*, she was ready to unload at or before
 8 A.M. on September 22, and if, as the plaintiffs affirm and the
 defendants deny, the *Nessfield* was, in the circumstances above
 set out, at or before the said hour, ready to unload within the mean-
 ing of the charterparty, the notice of readiness forthwith given was
 a due and sufficient notice in accordance with the charterparty."

The notice referred to was a notice in writing given forthwith
 (on the arrival of the steamer at Savona before 8 A.M. on
 September 22) to the defendants' agent of the readiness of the
 vessel to discharge.

The plaintiffs in their points of claim alleged that, if the cargo
 had been discharged at the average rate of 500 tons per day,
 as provided in the charterparty, the discharge would have been
 finished by noon on October 4, whereas it was not in fact
 finished until 1.30 P.M. on October 8, making 4 days 1½ hours
 on demurrage, and they claimed 157*l.* 1*s.* 8*d.* as the amount
 due in respect of such demurrage.

In their points of defence the defendants said that the steamer
 was not ready to unload within the meaning of the charterparty
 on September 22 or before noon on September 25, when dis-
 charge in fact commenced and was continued thenceforth at
 the rate provided for by the charterparty (subject to the
 omission of holidays, &c., as likewise provided), and that no
 demurrage was incurred; that it was the captain's duty to
 raise the cargo from the hold and bring it to the ship's rail
 for delivery to the consignee; that the labourers at the port

would not do their work or allow it to be done until the vessel was lengthwise alongside the wharf; that the *Nessfield* was not so alongside the quay before noon on September 25, and, as the captain was not able or ready to perform such duty before that time, the ship was not ready to unload within the meaning of the charterparty. And, after pleading in the alternative their view of the practice of the shore labourers above stated, and that it was the captain's duty under the circumstances to bring the cargo to the rail by shore labour, which he was not able or ready to do before noon on September 25, the defendants said that for the same reasons the steamer could not deliver at the rate of 500 tons a day at any rate before noon on September 25. The defendants did not admit that the ship arrived at Savona on September 22, but said that her arrival at the Punta on that day was not an arrival within the meaning of the charterparty, as the vessel had, pursuant to its terms, been ordered alongside a wharf. They also pleaded that the delay caused by the refusal of the labourers was a matter "beyond the control of the consignees" within the meaning of clause 8 of the charterparty.

The action was tried before Hamilton J., who on May 25, 1911, gave judgment for the plaintiffs, following the decision of Pickford J. given on December 21, 1909, on a charterparty in the same form in a case of *Kish v. Compagnie L'Union des Gaz*.

The defendants appealed, and the appeal was heard (by consent before two judges only) on December 12, 1911.

J. R. Atkin, K.C., and *Rowlatt*, for the appellants. The obligation to unload was on the steamer up to the ship's rail, and afterwards on the consignees. The ship was not ready or able or willing to unload until September 25, and she could not be entitled to payment in respect of demurrage except from the time when she was ready to perform her part of the obligation. On the admissions it is plain she was not ready to unload. She had not reached her destination, and was not an arrived ship until she was berthed alongside the wharf: *Leonis Steamship Co. v. Rank, Ltd.* (1) The shore labourers are employed by the ship and they will not work until then.

(1) [1908] 1 K. B. 499, 514.

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C. A. The cause of delay, namely, the shore labourers' practice, if
 1911 there was any delay, was a matter "beyond the control of the
 NORTHFIELD consignees" within the meaning of clause 8 of the charterparty:
 STEAMSHIP *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (1), affirmed as *S.S. Knuts-*
 COMPANY *ford, Ltd. v. Tillmanns & Co.* (2); *Larsen v. Sylvester & Co.* (3);
 v. *In re Allison & Co. and Richards* (4); *Budgett & Co. v. Binnington*
 COMPAGNIE *& Co.* (5)
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Bailhache, K.C., and *Adair Roche*, for the plaintiffs. It is, of course, the duty of the ship to get to the berth when ordered; but at Savona it is impossible to unload until the ship is berthed. This causes a difficulty as to who is to pay for the time between arrival in port and actual berthing. To obviate this an express provision is inserted in the charterparty that time is to "commence when steamer is ready to unload and written notice given, whether in berth or not." That means that after notice any delay between getting to port and getting to berth must be paid for by the charterer and not by the ship. When the ship is in port she is, for the purposes of the charterparty, an arrived ship, although she is not at berth.

The regulations as to unloading by shore labourers do not bring the case within the strike clause. The words "or any other causes or accidents beyond the control of the consignees" must be read as referring to matters ejusdem generis with strikes, lock-outs, or civil commotions: *Fenwick v. Schmalz* (6); *Thorman v. Doughty Steamship Co.* (7) A regulation of shore labourers sanctioned by the port authorities is not ejusdem generis with strikes, lock-outs, and civil commotions. [They also referred to Carver's Carriage by Sea, p. 723.]

Rowlatt in reply.

Cur. adv. vult.

1911. Dec. 14. COZENS-HARDY M.R. This appeal raises a question on the construction of a charterparty, the material facts being agreed.

(1) [1908] 2 K. B. 385.

(2) [1908] A. C. 406.

(3) [1908] A. C. 295.

(4) (1903) 20 Times L. R. 29.

(5) (1890) 25 Q. B. D. 320; [1891] 1 Q. B. 35.

(6) (1868) L. R. 3 C. P. 313.

(7) [1910] 1 K. B. 410.

By clause 1, the steamer was to load a cargo of coal at Sunderland, and proceed therewith to Genoa or Savona as ordered and there deliver her cargo alongside any wharf ^{and}_{or} vessel ^{and}_{or} craft as ordered.

By clause 8, the cargo was to be taken from alongside by consignees at port of discharge at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, "provided steamer can deliver it at this rate; if longer detained, consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day." "Time to commence when steamer is ready to unload and written notice given, whether in berth or not."

The steamer was ordered to Savona, and arrived and was moored at the Punta, inside the port and harbour of Savona, on September 22. All the berths alongside wharves were occupied by other vessels, and the steamer could not get to the berth alongside the wharf until September 25. The question in substance is this: Who has to bear the loss occasioned by the delay?

Now it is admitted that by reason of certain rules, made by the shore labourers and recognized and sanctioned by the port authorities, shore labourers will not discharge vessels until they are in berth alongside a wharf, and, further, that the cargo is not brought to the rail by the ship's crew but by the shore labourers. It must, I think, be taken that these rules are, and have for several years been, part of the regulations of the port of Savona, which the parties to the charterparty must be assumed to know. This being so, the express provision of clause 8 applies.

Time commences, not when unloading in fact begins, but when the steamer is ready to unload "whether in berth or not." She was ready to unload on September 22, though not in berth, and written notice was given on that day.

It is, however, contended that the earlier words, "provided the steamer can deliver," point to a different conclusion, as the steamer was not in fault, and could not deliver earlier. But these words seem to me to have no bearing upon the case. They only deal with the rate of discharge of the cargo when once the

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C. A. discharge has begun, and are concerned with what I may call
1911 the mechanical facilities of the steamer for delivery.

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Then it is said that the final sentence in clause 8 exempts the charterers : " In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage." But delay occasioned, not by a strike or by anything analogous to a strike, but by a regulation of the port of Savona, cannot fall within this exception.

It follows that, in my opinion, the judgment of Hamilton J., following a decision of Pickford J. on the same charterparty, in favour of the plaintiffs is correct; and this appeal must be dismissed with costs.

FARWELL L.J. The question in this case depends on the construction of the charterparty of August 25, 1909, on which three points arise.

The vessel was chartered to proceed to Genoa or Savona as ordered, on signing bills of lading, and there deliver her cargo alongside any wharf ^{and}_{or} vessel ^{and}_{or} craft as ordered. The consignees were to take the cargo alongside at port of discharge. " Time to commence when steamer is ready to unload and written notice given, whether in berth or not."

The first question arises on these words. There was no berth vacant at Savona at which the steamer could be unloaded until four days after her arrival, and accordingly she did not get a berth until the fifth day; there was no other means of unloading her except alongside a wharf when there was a berth vacant. In my opinion the words " whether in berth or not" were inserted to meet this very case. I do not think it possible to read them as equivalent to " although she be moored alongside a vessel or craft and not in berth." Want of space to berth is of very frequent occurrence, and the parties appear to me to have expressly provided for it; and this disposes also of the contention that the ship was not " ready to unload." She was ready so far as she was concerned, and the fact that she was not in a berth is rendered immaterial by this clause.

The next question arises on the words "The cargo to be taken from alongside by consignee at port of discharge, free of expense and risk to steamer, at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate."

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At Savona it is the course of business, recognized since 1907 by the port authorities, that steamers are not discharged until they are in berth alongside a wharf, and that shore labourers will only work in connection with the discharging of vessels when they are in berth alongside a wharf, and that all the work is done by shore labourers, the crew not being employed to bring the cargo to the rail. In my opinion, these facts are irrelevant in considering the question whether "the steamer can deliver it at this rate"; those words refer to the structural capacity and fittings of the vessel, not to her position in the harbour or to the supply of labour from the shore available for the consignees.

The third question is as to the strike clause: "In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees, which prevent or delay the discharging." I have no doubt that the other causes must be restricted to causes ejusdem generis, and I think it impossible to say that a regulation made by the shore labourers as to the terms on which they will work, recognized and sanctioned by the port authority for four years, is ejusdem generis with a strike.

The course of business at Savona was well known to both parties at the date of the charterparty, and if this possible absence of labour was contemplated as within this exception, it should have been clearly stated.

I think Hamilton J.'s judgment should be affirmed.

Appeal dismissed.

Solicitors for appellants: *Waterhouse & Co.*

Solicitors for plaintiffs: *Botterell & Roche.*

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[IN THE COURT OF APPEAL.]

1911

GREGORY v. TORQUAY CORPORATION.

Dec. 11.

County Court—Practice—Pleading—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)—Statute of Limitations—County Court Rules, 1903, Order x., rr. 14, 18.

Where an action to which the Public Authorities Protection Act, 1893, applies is brought in a county court, and the defendants desire to rely upon the fact that the action was not commenced within the time thereby limited, it is sufficient to raise that defence by a notice in the form given in Form 85 of the County Court Forms (referred to in County Court Rules, 1903, Order x., r. 14), "That the claim . . . is barred by a statute of limitations," without specifying the year, chapter, and section or the title of the statute.

The decision of Pickford and Lush JJ. [1911] 2 K. B. 556, affirmed.

Semble, that such a defence also complies with Order x., r. 18.

GREGORY on February 25, 1911, brought an action in the Torquay County Court, under the Fatal Accidents Act, 1846, to recover damages for the death of his son (which occurred on December 1, 1910), owing, as was alleged, to the negligence of the Torquay Corporation's servants in their treatment of the son while he was in the corporation's isolation hospital, such negligence being alleged to have taken place in May, 1910.

The Public Authorities Protection Act, 1893, provides that an action against any persons for any neglect in the execution of a public duty "shall not lie or be instituted unless it is commenced within six months next after the . . . neglect . . . complained of."

The corporation in reliance on this provision gave a notice of special defence under Order x., r. 14, of the County Court Rules, 1903, according to Form 85 in the appendix to the Rules.

Rule 14 provides that "where a defendant intends to rely on the defence of any statute of limitations, his statement shall be according to the form in the appendix."

Form 85 is a notice that the defendant intends at the hearing of the action "to give in evidence and rely upon the following ground of defence . . . That the claim for which the defendant is summoned is barred by a statute of limitations."

By Order x., r. 18, "When in any action the defendant relies on any statutory defence . . . he shall in his statement (except in the case provided for by rule 14 of this Order) set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies, or otherwise sufficiently indicate the nature of the defence on which he relies."

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At the trial the plaintiff obtained a verdict for 50*l.* His counsel then contended that the defendants' notice was insufficient for non-compliance with Order x., r. 18.

The deputy county court judge held that the Public Authorities Protection Act, 1893, was not a "statute of limitations" within Order x., r. 14, and that the notice was insufficient, and therefore he gave judgment for the plaintiff.

On appeal Pickford and Lush JJ. held that the corporation's notice was sufficient and allowed the appeal. (1)

The plaintiff appealed.

Waddy, for the plaintiff, repeated his argument in the Court below.

Clavell Salter, K.C., and *Percival Clarke*, for the defendants, were not called on.

COZENS-HARDY M.R. This seems to me a most hopeless appeal. An action was brought by the appellant against the Torquay Corporation. The negligence complained of was alleged to have occurred more than twelve months ago and more than six months before the commencement of the action. A special defence was put in as required by Order x., r. 14, which provides that "where a defendant intends to rely on the defence of any statute of limitations, his statement shall be according to the form in the appendix." I have looked at the form in the appendix, which is a notice that the defendant intends to rely upon the defence "that the claim for which the defendant is summoned is barred by a statute of limitations," and the defendants delivered a statement in accordance with the form. But Order x., r. 18, provides that when the defendant relies on any statutory defence "he

(1) [1911] 2 K. B. 556.

C. A. shall in his statement (except in the case provided for by rule 14
1911 of this Order) set forth the year, chapter, and section of the
statute, or the short title thereof, and the particular matter on
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which he relies, or otherwise sufficiently indicate the nature of the defence on which he relies.”
The plaintiff’s claim plainly is barred by the Public Authorities Protection Act, 1893, and yet we are seriously asked to say that the defence put in by the defendants is not sufficient because it does not specify the year, chapter, and section of the statute relied on or call the statute by the short title of “The Public Authorities Protection Act, 1893,” but simply says the claim is barred “by a statute of limitations.”

We all know in this Court that there are a good many statutes of limitation, and to say that the Public Authorities Protection Act, 1893, is not a statute of limitations, when you find it imposes a limit of six months within which many kinds of action must be brought, passes altogether my understanding.

I think the defendants are perfectly right, and that they pleaded in the manner pointed out by the Rules. Even if the case were not within r. 14 and according to the form there referred to, I see no answer to the suggestion that the defence is sufficient to “indicate the nature of the defence” on which the defendants rely. I have read the judgments of Pickford and Lush JJ., and they seem to me so completely and absolutely to cover the ground that it would be almost unjustifiable for me to say more than that the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. I think that the contention of the appellant was highly honoured by being made the subject of the careful and elaborate judgments of the two learned judges in the Court below. The respondents, who were the defendants in the county court action, desired to rely upon the statute of limitations applicable to the case, namely, the Public Authorities Protection Act, 1893. They pleaded in the prescribed way to that effect; and on what ground this plea could be said to be a bad one I cannot understand. To my mind it is quite immaterial whether the defence

was put in under r. 14 or r. 18. I have no doubt myself that it was put in under r. 14, and properly put in under that rule; but if we were to take the defence as having been put in under r. 18, I am satisfied that it sufficiently indicated the nature of the statutory defence on which the defendants relied.

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FARWELL L.J. I agree; and I have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Mann & Crump, for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

Solicitors for respondents: *Gribble, Oddie, Sinclair, Rowlatt & Johnson, for P. H. W. Almy, Torquay.*

F. E.

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 Dec. 14, 15.

Seaman—Desertion—Forfeiture of Wages—Expenses caused by Desertion—Reimbursement—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 221, 232—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 28, sub-s. 1.

By s. 221 of the Merchant Shipping Act, 1894, if a seaman deserts from his ship he forfeits the wages which he has then earned, and by s. 232 forfeited wages shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship.

By s. 28 of the Merchant Shipping Act, 1908, on the termination of the voyage, the master is to furnish a "reimbursement" account of any expenses caused "by the absence of the seaman, where the absence is due to desertion," and the master is "entitled to be reimbursed" out of the forfeited wages any sums in the "reimbursement" account which are properly chargeable.

On the arrival of a ship, in the course of a voyage, at San Francisco sixteen members of the crew deserted. The ship remained at that port for rather more than five months, being used there as a coal hulk. At the end of that period sixteen seamen were engaged as substitutes for the deserters at a higher rate of pay, and the ship sailed on her homeward voyage to the United Kingdom. The amount saved in the wages of the deserters during the period the ship was at San Francisco exceeded the amount of the excess of wages paid to the substitutes:—

Held, that the amount so saved could not be set off against the excess

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of wages, and that the master was entitled to be reimbursed out of the forfeited wages the excess of wages paid to the substitutes.

During the stay of a ship at Melbourne several members of her crew deserted on various dates. In consequence of the difficulty in obtaining substitutes for the deserters the ship was detained at the port one day longer than would otherwise have been the case. The master claimed to be reimbursed out of the wages of the deserters the sum of 16*l.*, representing one day's expenses for wages and keep of the crew and coal consumed on the ship:—

Held, that this expenditure was not an expense caused by the desertions.

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CASE stated by a metropolitan magistrate.

At the Thames Police Court an appeal was entered by Samuel Quayle, being the master of the sailing ship *Beacon Rock*, hereinafter called the respondent, under s. 28 of the Merchant Shipping Act, 1906 (1), against the decision of William Henry Godfrey Deacon, hereinafter called the appellant, for that the appellant had wrongfully refused to allow certain sums amounting to 109*l.* 10*s.* shewn in the reimbursement accounts to be deducted from the amounts due on account of wages shewn in the delivery accounts of sixteen seamen of the crew of the said ship who had deserted from the ship at San Francisco in the United States of America.

Upon the hearing of the appeal the following facts were proved or admitted:—

A. The respondent is and at all times material was the master of the sailing ship *Beacon Rock*. The appellant is the superintendent of the Mercantile Marine Office, Dock Street, London, and is the proper officer referred to in s. 28 of the Merchant Shipping Act, 1906.

B. Between August 12 and August 15, 1907, the captain and a crew of twenty-five officers, seamen, and apprentices signed articles for a voyage on the *Beacon Rock* not exceeding three years to certain places including San Francisco, ending at any one of certain ports in the United Kingdom or on the continent of Europe.

C. In the course of the voyage the ship arrived at San Francisco on January 19, 1908.

(1) See note on p. 467, post.

D. Between January 25 and March 26, 1908, while the ship was at San Francisco engaged in discharging her cargo and taking in ballast, the sixteen seamen in question deserted.

E. At the time of the last desertion, namely, March 26, there were due to all the said seamen wages to the total amount of 89*l.* 13*s.* 9*d.*

F. The facts of the desertions were duly entered in the official log in accordance with the provisions of the Merchant Shipping Acts.

G. On February 17 on the instructions of the owners the respondent began to take in ballast in anticipation of proceeding under canvas, and by March 13 365 tons of ballast had been shipped. On March 13, by which date fifteen men had deserted, the respondent received the following telegram from his owners in Glasgow :—" Combined with homeward charter at combination rates, have chartered for a lump sum for a period of six months at 500 dollars per month to be used for store ship. This is your authority for signing contract on our behalf "; and the respondent did sign such contract.

H. From time to time the owners in Glasgow had been advised by the respondent that desertions were taking place among his crew, and they had also been advised by cable on January 22 that the vessel would be ballasted and ready to proceed on February 28.

I. From March 23 until September 23, 1908, the ship was used as a store ship or hulk for coals and was stationed at Saucelito Bay near San Francisco.

J. Between March 26 and September 2, a period of five months and seven days, no seamen were engaged to take the places of any of the sixteen deserters.

K. The wages of sixteen seamen for the said period of five months and seven days would have amounted to more than the sum of 109*l.* 10*s.* mentioned in paragraph O.

L. It was at all times possible for the respondent to secure additional seamen by giving two or three weeks' notice to a shipping master at San Francisco, and the respondent did secure additional seamen when he wanted them for his voyage homeward. On September 2 Wilson, the cook, and on

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1911 September 12, 1908, two new seamen were signed on and sailed with the ship on her homeward voyage.
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M. Between October 12 and October 24, 1908, fourteen other seamen were signed on and sailed with the ship on her homeward voyage.

N. The ship sailed from San Francisco on October 27, 1908, and arrived at London on April 7, 1909.

O. Upon the ship's return to London on the termination of her voyage the respondent furnished to the appellant, the proper officer under s. 28 of the Act of 1906: (1.) Delivery accounts shewing the total wages due to the sixteen deserters up to the time of desertion, namely, 89*l.* 13*s.* 9*d.* (2.) Reimbursement accounts shewing the expenses alleged to have been caused by the desertion of the sixteen seamen and the hiring and excess pay of their alleged substitutes, namely, 109*l.* 10*s.*

P. The appellant disallowed the sums shewn by the reimbursement accounts.

Q. No evidence was asked for by the appellant nor supplied to him save the said accounts.

R. The excess pay of the alleged substitutes was no more than would have been paid if the substitutes had been hired immediately after the desertion.

On the part of the appellant it was contended that the sum of 109*l.* 10*s.*, the total of the reimbursement account, was not properly chargeable against the wages, namely, 89*l.* 13*s.* 9*d.*, of the deserters, because (1.) having regard to the lapse of time (five months and seven days) between the last of the desertions and the engagement of the sixteen other seamen to work the ship, the said sixteen other seamen could not be said to be substitutes within the meaning of ss. 221 and 232 of the Merchant Shipping Act, 1894, and the expenses of engaging and employing such seamen were not, within the meaning of s. 28, sub-s. 1 (b), of the Act of 1906, expenses caused to the master or owners of the ship by the absence of the seamen; (2.) alternatively, that if the sixteen other seamen were substitutes within the said sections the appellant, as proper officer, was entitled to take into consideration the saving made by the master or owners of the ship by reason of the non-engagement and employment of any

seamen during the period of five months and seven days and to set off the sum so saved against the expenses of and incidental to the engagement and employment of the sixteen other seamen.

On the part of the respondent it was contended that the said sum of 109*l.* 10*s.* was an expense due to the desertion of the said sixteen seamen within s. 28, sub-s. 1 (*b*), of the Act of 1906, and that the said sum was properly chargeable by the respondent in his reimbursement accounts against the wages of the sixteen deserters, and that the appellant should have allowed the same.

The magistrate held that the sum of 109*l.* 10*s.* ought to have been allowed in the reimbursement accounts and was properly chargeable against the wages, 89*l.* 13*s.* 9*d.*, of the sixteen deserters. With regard to the first contention of the appellant he found that there was no abandonment of the adventure by the respondent or owners, and with regard to the second contention he found that there was no evidence that it was either more or less profitable to use the ship as a coal hulk than in the ordinary way.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law.

Sir Rufus Isaacs, A.-G. (Sir John Simon, S.-G., Rowlatt, and Hamar Greenwood with him), for the appellant. First, having regard to the lapse of time which occurred after the desertion and before the men were engaged to bring the ship home, the magistrate was wrong in law in holding that those men were substitutes engaged in the places of the deserters within the meaning of s. 221 of the Act of 1894, and therefore the excess of wages paid to those men was not an expense caused by the absence of seamen due to desertion within s. 28, sub-s. 1 (*b*), of the Act of 1906. Secondly, assuming the men were engaged as substitutes for the deserters, in ascertaining whether any expenses were caused to the master or owners by the desertion regard must be had to the fact that during the time the ship remained at San Francisco, a period of over five months, the

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owners were saved the wages and keep of the sixteen men who had deserted, and this saving was in amount greater than the excess of wages paid to the substitutes. Under s. 232 of the Act of 1894 the master is only entitled to be reimbursed "the expenses caused by the desertion." The word "expenses" in that section means any loss suffered or incurred by reason of the desertion, and although it may be that it was right under s. 28, sub-s. 1 (b), of the Act of 1906 to include the excess of wages in the reimbursement account, yet in the circumstances of this case the desertions did not cause the owners any loss, and the forfeited wages of the deserters cannot be applied under s. 232 in reimbursing the master for the excess of wages paid to the substitutes.

A. Neilson, for the respondent. The consequences of desertion as regards a seaman are, under s. 221 of the Act of 1894, that he forfeits the wages which he has then earned, and also becomes liable to satisfy any excess of wages paid to a substitute. Then s. 232 provides that forfeited wages are to be applied in reimbursing the expenses caused by the desertion to the master. "Expenses" does not mean loss or damage, but clearly refers to the excess of wages and to the actual expenses incurred in obtaining the substitute. If the contention of the appellant is right an account would always have to be taken in every case of desertion to shew every item of expenditure that might possibly have been saved by the absence of the deserter, for desertions usually take place as soon as a ship arrives at a port, but the substitutes are never engaged until the latest possible moment before sailing, which may be a considerable time after the desertion. There is nothing in the Acts to shew that it was ever intended that an account of that sort should be taken. Supposing there were ten deserters and only five substitutes could be obtained and consequently the ship had to come home shorthanded, could it be contended that the amount saved in the wages and keep of five of the deserters must be set off against the excess of wages paid to the substitutes? [He referred to *Halliday v. Taffs*. (1)]

Sir Rufus Isaacs, A.-G., in reply. It was not intended by the Act of 1894 that the owners should make a profit out of desertion,

and if in fact the saving in wages and keep of the deserters exceeds the extra amount of wages paid to the substitutes there is no "excess of wages" within s. 221. The argument for the respondent involves reading the section as if, instead of "excess of wages," it said "any increase in the rate of wages."

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LORD ALVERSTONE C.J. We will hear the next case before delivering judgment.

NEATE v. WILSON.

CASE stated by two justices of the peace for the city of Cardiff.

At a Court of summary jurisdiction in Cardiff A. E. Wilson, master of the British steamship *Mountby* (hereinafter called the respondent), appealed against a decision given by Reginald Cheighton Neate (hereinafter called the appellant) when dealing, as the proper officer under s. 28 of the Merchant Shipping Act, 1906, with the reimbursement accounts of certain seamen who had deserted from the *Mountby* in the course of a voyage.

On the hearing of the appeal the following facts were proved :—

At the times material to this case the respondent was master of the *Mountby*. By articles of agreement entered into at South Shields on December 14, 1909, a crew was engaged for the *Mountby* for a voyage not exceeding three years' duration to certain ports including Melbourne.

On March 2, 1910, the *Mountby* arrived at Melbourne, where four members of the crew deserted, and the respondent was compelled to employ four substitutes in their stead.

On March 21, when the *Mountby* had finished loading at Melbourne and was in readiness to sail early on March 22, 1910, four more members of the original crew, together with the four substitutes, deserted. In consequence thereof the *Mountby* was unable to sail on March 22, and the respondent, in order to save payment of further pier dues, arranged that she should be moved from the pier whilst substitutes were being found to take the place of the deserters. On March 22 the respondent and his mate were engaged in finding substitutes, and at 8 p.m. they returned to the steamer with eight substitutes. It was discovered on their return that another member of the crew had deserted. A substitute was found for him at 12 p.m. the same night.

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On March 23 the *Mountby* sailed from Melbourne, having been detained one whole day by the desertions.

The *Mountby* arrived at Cardiff on June 26, 1910, where the voyage ended and the crew were paid off.

The respondent delivered to the appellant as the proper officer accounts of the wages and effects of the seamen who had been left behind abroad by reason of desertion. The respondent elected to deal with the accounts collectively in accordance with s. 28, sub-s. 4, of the Merchant Shipping Act, 1906. In each of the accounts of the nine deserters the sum of 3*l.* 2*s.* 2*d.* "proportion of detention as per master's letter" was claimed on the reimbursement account, making a total of 27*l.* 19*s.* 6*d.* From this letter, which was addressed to the appellant, it appeared that the respondent claimed 25*l.* reimbursement for one day's detention of the *Mountby* at Melbourne after loading was finished, while substitutes were being found; 2*l.* 10*s.* cost of pilotage in shifting the *Mountby* from the quay to an anchorage; and 9*s.* 6*d.* the respondent's personal expenses incurred in the search for substitutes.

The appellant disallowed the sum of 25*l.*, but allowed the two sums of 2*l.* 10*s.* and 9*s.* 6*d.*; and in substitution for the item of 3*l.* 2*s.* 2*d.* in each of the accounts there was inserted and allowed by the appellant a sum of 6*s.* 7*d.*, being the proportion of the two sums 2*l.* 10*s.* and 9*s.* 6*d.*

The wages of the crew amounted to 4*l.* 16*s.* 2*d.* a day and the cost of their food amounted to 1*l.* 16*s.* 3*d.* a day; eight tons of coal, of the value of about 10*l.*, were consumed in getting up steam to take the *Mountby* from the pier to the anchorage where she lay under banked fires from March 22 to March 23.

It was contended before the justices by counsel for the respondent that the damage suffered by the respondent flowed from the desertions and should be reimbursed from any money that might be due to the deserters. The sum claimed for deduction in the respondent's letter had been made up in a particular way, but he (counsel) was not satisfied that that was the proper basis upon which the damage ought to be made out. He submitted that the proper basis was the amount of expenses proved to be caused to the respondent by reason of the desertions. The claim was the same, namely, one for damages or expenses caused by

desertion, but the mode of arriving at the correct amount had been changed. He contended that the said sums of 4*l.* 16*s.* 2*d.*, 1*l.* 16*s.* 3*d.*, and 10*l.*, making a total of 16*l.* 12*s.* 5*d.*, were out of pocket expenses incurred by the respondent, and that inasmuch as they were expenses that would not have been incurred but for the desertions, but were expenses directly attributable to the desertions, they fell within the meaning of s. 28 of the Act of 1906 and should therefore be allowed.

It was contended by counsel for the appellant (1.) that the said three sums were not expenses caused to the respondent by the desertions; (2.) that the detention of the steamer, if any, was due at least in part to causes other than the absence of the seamen; (3.) that the claim was bad on the ground of remoteness of damage; (4.) that the justices had no power to allow an amendment of the original claim and a substitution of other items for those which had been disallowed; and that damages for detention were not expenses within s. 28.

The justices held that there had not been any amendment of the original claim, and that it was competent for them on the hearing of the appeal to inquire whether the sum of 25*l.* claimed in respect of the detention of the vessel, or any lesser sum, had been incurred by the respondent as expenses caused by the desertions and to allow to the respondent such sum as they found to be properly chargeable. The justices found that the vessel was detained for one day by reason only of the desertion of the seamen, and that owing to the detention the respondent had incurred an expense of 16*l.* 12*s.* 5*d.* (made up of the said three sums), and they held that that sum was an expense caused to the respondent by the absence of seamen due to desertion within s. 28, and they accordingly allowed that sum to be reimbursed to the respondent out of the wages due to the seamen who had deserted at Melbourne.

The question for the opinion of the Court was whether the justices came to a correct determination and decision in point of law.

Sir Rufus Isaacs, A.-G. (Sir John Simon, S.-G., B. W. Ginsburg and Rowlatt with him), for the appellant. The respondent

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claims the right to bring into the reimbursement account the cost of one day's detention of the ship alleged to be caused by the desertion. In the reimbursement account the amount was put at 25*l.*, and that sum was claimed as damages. On the hearing of the appeal before the justices it was stated to be the expense of the detention of the ship, and the justices allowed the claim but reduced the amount to 16*l.* When once a reimbursement account has been delivered and dealt with by the proper officer under s. 28 of the Act of 1906, a Court of summary jurisdiction cannot alter or amend the account. Sect. 28, sub-s. 3, gives a right of appeal from the decision of the proper officer, but it is strictly an appeal and not a rehearing. But in any event the justices were wrong in allowing any sum in respect of the detention of the ship. Whatever the words "expenses caused by the desertion" in s. 232 of the Act of 1894 may mean, they clearly cannot include general damages for breach of contract, which is what the respondent is in effect contending for. Although sub-s. 4 of s. 28 of the Act of 1906 permits the reimbursement account to be dealt with collectively where two or more seamen have been left behind, the master is only to be reimbursed the amounts allowed under the section, that is to say, the expenses due to the desertion of each individual seaman. It is not permissible to make a general claim for damages for detention and divide it between the various deserters, more particularly when, as in the present case, the desertions have taken place at different dates and it is therefore impossible to say what proportion of the damage is recoverable from each individual deserter.

A. Neilson, for the respondent. Any expense that is directly occasioned by the desertion is recoverable under s. 232 of the Act of 1894. The justices have found, and the question is one of fact, that the ship was detained one day solely by reason of the desertions, and that as a consequence of the detention certain expenses were incurred by the master. On those findings of fact the justices rightly came to the conclusion that the sums claimed were expenses caused by the desertions.

Rowlatt replied.

Cur. adv. vult.

1911. Dec. 15. LORD ALVERSTONE C.J. The question which we have to consider in these two cases is whether certain payments or expenses charged by the masters of two ships in their reimbursement accounts against the wages of seamen who had deserted have been properly included in those accounts. The facts of the two cases are different, but the question in each case turns mainly if not entirely on ss. 221 and 232 of the Merchant Shipping Act, 1894.

The facts in the first case, *Deacon v. Quayle*, may be stated very shortly. Certain seamen signed articles for a voyage not exceeding three years' duration on a ship called the *Beacon Rock*, to go to certain ports including San Francisco, and to be finally discharged on the arrival of the vessel at a port in the United Kingdom or on the Continent of Europe. The ship reached San Francisco on January 25, and sixteen of the crew deserted. There was a difficulty as to what should be done in the circumstances, as the vessel had not got a charterparty at that time, and the master commenced to put ballast on board in order that the vessel might go in search of a cargo. By March 13, 365 tons of ballast had been shipped. It is not stated in the case whether that was all the ballast that was required, but I should think it was probably not quite enough. On that date the master received a cablegram from his owners which is set out in the case, and in consequence the vessel remained for nearly six months at San Francisco employed as a store ship. She then came home with a cargo to a port in the United Kingdom. Before the vessel left San Francisco sixteen men were shipped on board in the place of the sixteen who had deserted, and to these sixteen new men a higher rate of wages per month had to be paid. The amount of wages due to the deserters at the time they left the ship was 89*l.* 13*s.* 9*d.*, and the extra amount paid in connection with the engagement of the substitutes was 109*l.* 10*s.*, made up of the expenses incurred in obtaining them and the excess of wages paid to them. In these circumstances it is contended by the Attorney-General that although this sum of 109*l.* 10*s.* would *prima facie* be a proper item to be included in the reimbursement account, yet it ought not to be included in this case, for two reasons. First, because the new men could

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not rightly be said to have been engaged as substitutes for the deserters. This point was not strongly pressed, but it was taken. Secondly, it was said that if an account were taken it would appear that, in spite of the desertions, there had in fact been a large saving to the owners, because the master was saved five months' wages and keep of the sixteen men who deserted, and that those wages would, as is found in paragraph K of the case, have amounted to more than the sum of 109*l.* 10*s.*; that the desertions had therefore not caused any expense to the master, and the sum of 109*l.* 10*s.* ought, therefore, not to be included in the reimbursement account.

With regard to the question whether the new men were engaged as substitutes for those who had deserted, the magistrate has found that there was no abandonment of the adventure by the master or owners and that the men were engaged as substitutes. I see no ground for differing from that finding. Under the articles the men who deserted were bound to stay by the ship and to come home in her. The men who were shipped to bring the vessel home were undoubtedly shipped in the places of those who had deserted, and I think the magistrate has rightly held that they were substitutes within the meaning of s. 221 of the Act of 1894.

The second question is more difficult, and one has to consider the meaning and effect of ss. 221 and 232 of the Act of 1894. [The Lord Chief Justice read the sections, and continued:] The provisions of those sections are obviously for the protection of a master or owner, because not only are the wages and effects of a deserter to be forfeited, and the seaman is made liable to satisfy any excess of wages paid to a substitute engaged in his place, but he also forfeits the wages which he may earn on another ship, and under s. 232 the wages earned by the deserter subsequently to the desertion may be recovered by the master of his former ship. In my opinion, these two sections deal with the simple question, if I may use the expression, of the forfeiture of a deserter's wages, which go to the Exchequer unless the master is entitled to be reimbursed out of them expenses incurred by the master in connection with the substituted men. I can find nothing in either section which authorizes a general inquiry as to

whether there has been a saving of expense to the master in connection with the wages account or food account. A case put in the course of the argument affords a good illustration of what I mean. The common instance of desertions is where the rate of wages at a port of arrival is higher than is being paid to the crew of the ship, and in that case some of the crew frequently desert as soon as the ship arrives. But the vessel may very likely remain in that port for a month or two, and the substitutes are not shipped until close to the time for the departure of the vessel on her homeward voyage. In a great majority of these cases, therefore, questions could be raised by the Board of Trade as to whether there had not been some saving in the wages account which ought to be set off against the excess of wages. There is nothing in either of these sections to indicate that that inquiry was ever intended to be entered upon.

Sect. 28 of the Act of 1906 is mainly, if not entirely, concerned with the provision of machinery for carrying out the scheme enacted by ss. 221 and 232 of the earlier Act. The section provides that the reimbursement account is to contain "any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion." That is obviously a reference to s. 221, and in my opinion the language of s. 28 also points to the conclusion that the officer of the Board of Trade to whom the accounts have to be delivered was only intended to deal with the comparatively simple question of the expenses incurred by the master in connection with the particular seaman. I do not find anything in s. 28 to support the suggestion that the officer of the Board of Trade is to take upon himself the consideration of the sort of account which is illustrated by the table put in by the Board of Trade in *Deacon v. Quayle* shewing the number of days' wages saved, and the saving in food, and the net result to the owners of the desertions. I think that sort of account would often involve an inquiry of very great difficulty, and that it was never intended that such an inquiry as that should be undertaken. The only other subsection in s. 28 which has any bearing on this question is sub-s. 4, which enables the accounts to be dealt with collectively. [The Lord Chief Justice read sub-s. 4 of s. 28.] I think that that

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sub-section supports the conclusion which I have arrived at, for it shews that there is to be a collective calculation of how much is due to all the seamen collectively, and how much is due to the master on his reimbursement account, and I think that if it had been intended to open up the general question of how much gain or loss had resulted to the owners very different language would have been used.

The view which I have been expressing is, I think, the view which was expressed, as an obiter dictum, by Hamilton J. in *Halliday v. Taffs* (1), where, referring to the word "expenses" in ss. 221 and 232 of the Act of 1894, he said: "It seems to me clear from the context that the word refers to expenses directly caused, such as disbursements in the nature of payments for service substituted for that which the deserter ought to have rendered."

In the case of *Deacon v. Quayle* I therefore come to the conclusion that the appeal must be dismissed on the ground that the expenses claimed in the reimbursement account were incurred in obtaining seamen as substitutes for those who had deserted; and that to uphold the contention urged on behalf of the respondent would involve the holding of an inquiry as to what was the net result upon the whole adventure of the desertions. For the reasons which I have given I do not think that it was ever intended that an inquiry of that sort should be held, and therefore the claim of the Board of Trade for the disallowance of these particular items fails.

The facts in *Neate v. Wilson* are somewhat different. Some of the seamen deserted on the arrival of the ship at Melbourne; others deserted on a later day; and it is said that in consequence of the desertions the vessel was detained at Melbourne a day later than she otherwise would have been. I do not think it is necessary to discuss the question of the amount of expense which can be attributed to the desertion of each individual man. The Attorney-General contended very strongly that the claim for the expense of the one day's detention could in no case be allowed, because on the master's own shewing the total expense must be apportioned between a number of seamen who deserted on

(1) [1911] 1 K. B. at p. 602.

different dates and whose desertion therefore contributed to a different extent to the delay. The necessity of considering questions of that sort strongly illustrates to my mind the difficulty of the inquiry which would have to be made. The claim of the master, as originally framed, was to be reimbursed the sum of 25*l.* in respect of one day's detention. That claim was disallowed by the Board of Trade officer. On appeal to the justices the amount was reduced to 16*l.* and that was allowed. The sum of 16*l.*, which was made up of items for wages, food, and coal, was said to be the actual damages suffered by the owners by the detention of their ship for one day. It is true the ship was detained, but I think this claim is too remote and cannot be allowed. The expenses actually incurred in obtaining substitutes have been allowed, but these other items are really damages for the detention of the vessel and are quite distinct from the actual expenses incurred in getting substitutes, and, as I said in the course of the argument, it is quite easy to imagine a case in which the circumstances were such that sailing at a later date might have the effect of causing a saving of expense rather than a loss.

For these reasons I am of opinion that the appeal in the second case must be allowed.

HAMILTON J. I am of the same opinion. We start with s. 221 of the Act of 1894, which imposes upon a deserting seaman, by way of punishment for his offence, three classes of liability: first, the forfeiture of wages and effects, secondly, the personal liability to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him, and, thirdly, in the United Kingdom, a liability to be imprisoned. As the result of enforcing that section there is created a fund consisting of wages earned up to the date of desertion, often a very substantial sum, which, after forfeiture and until the end of the voyage, will be in the hands of the shipowner or the master on his behalf. That, therefore, brings us to s. 232, under which primarily these cases arise, although it is necessary to bear in mind the provisions of s. 221, because that is the foundation of

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the whole matter. "Where any wages or effects are under this Act forfeited for desertion," provision is made for their destination, and as, under s. 233, forfeiture does not involve the adjudication of a forfeiture in a criminal proceeding against the seaman, but may be decided and determined "in any proceeding lawfully instituted with respect to those wages" (such as this proceeding) notwithstanding that the seaman himself has not been proceeded against, it has been common ground throughout these cases that upon the admitted desertion of the seamen in question their wages were not merely liable to forfeiture, but were in fact forfeited. Under s. 232, sub-s. 3, wages forfeited otherwise than for desertion shall, "in the absence of specific provision to the contrary, be for the benefit of the master." Comparatively, however, those are trivial matters, because in the case of desertion, which is much the more frequent offence, the amount of the forfeiture is also immensely greater than anything which can be forfeited for such matters as offences against discipline under s. 225, and the seaman who, after a voyage of several months, yields to the temptations of the shore and deserts, frequently leaves behind in the master's hands a very substantial sum indeed for wages honestly earned but forfeited by this desertion. Accordingly as regards such wages a separate provision is made, probably because otherwise the forfeiture of wages upon desertion might become an unintended source of revenue to the shipowner, and in those cases under sub-s. 1 it is provided that the forfeited wages shall be paid into the Exchequer and carried to the Consolidated Fund, subject to a right—and the word is imperative—on the part of the master or owner to have them first of all applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship. That sub-section is the root of the shipowner's right to reimbursement. The machinery, and to a certain extent a further definition of the right, are to be found in s. 28 of the Merchant Shipping Act, 1906. In both these sections, s. 232 of the Act of 1894 and s. 28 of the Act of 1906, a practically identical expression is used: "shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship." The reimbursement account under s. 28

is to be an account "of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion," and those sums becoming properly chargeable in reimbursement, the officer or, in the case of appeal, the Board of Trade shall allow sums shewn in the disbursement account and properly chargeable to be deducted from the amount due on account of wages shewn in the delivery account. Although the language of s. 232, "expenses caused by the desertion to the master or owner of the ship," is in itself somewhat wider than the words of s. 221, and is wide enough to include not only the excess of wages paid to the substitute, but also incidental expenses connected with the hiring of the substitute, the word used is still "expenses" and not "damages" or anything to which the principles governing the measure of damages would be applicable. Here the expense which is incurred by the master in connection with the engagement of the substituted seaman is in itself an expense incurred in a self-contained and complete transaction long subsequent to the termination of the master's liabilities to the seaman who has deserted. As soon as in consequence of the desertion of the original seaman, the master engages and subsequently in pursuance of his engagement pays a substituted seaman, to the extent of the excess rate of pay which he agrees to pay to the substituted seaman he incurs an expense, and he incurs it through the desertion, and, in this particular case, the expense is the extra sum that he has to pay. Had there been any question of rebate or discount, no doubt that might have been taken off to ascertain the real expense of paying the substituted seaman, but as there is none, the expense which consists of the excess wages to the substituted seaman is then and there a complete expense caused within the wording of s. 232. It is quite true that six months earlier in the first of these cases—not so much earlier in the other case—the master had been saved another expense in consequence of the desertion, because he had been saved the expense of continuing to pay wages to the seaman who had quitted the ship; but that is no part of the transaction of engaging a substitute. It is a different expense. It is measured by different figures, and it arises at a different time, although it arises from the same cause. The words

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“reimbursing the expenses caused by the desertion to the master” are fully satisfied upon the facts in both these cases by taking into account the excess wages paid to the substituted seaman in the one case, and in the other case the expenses properly incurred for the purpose of the ship because of the desertion. If the Crown is to succeed in its contention in *Deacon v. Quayle* a much wider meaning has to be attributed to the word “expenses,” a meaning so wide that it must be made almost equivalent to “damages for the breach of contract caused by the desertion,” or to “compensation for the desertion,” or to “an indemnity at the conclusion of the contract of service with the seaman against prejudice caused upon the whole by his desertion”—all expressions quite distinct from “expenses caused.” Probably the Legislature, when this section was framed, had no intention of enabling shipowners to get a windfall out of desertions. The expression “reimbursement” is used throughout, and the expression “reimbursement” is not used in s. 221, but only in s. 232 of the Act of 1894 and s. 28 of the Act of 1906. But it does not appear to me that the word “reimbursement” can be strained so far as to enable the Crown to set off against an expense, which was caused by the desertion in connection with the engaging of the substitute, a saving effected at an earlier date by reason of the deserter having ceased to earn any wages. It cannot have been intended that the reimbursement should involve the taking of a voyage account, possibly two years or more after the desertion in question, since this is an engagement which may last for three years. It would have to be, not an ordinary voyage account, which relates to a voyage from a terminus a quo to a terminus ad quem, but a voyage account co-extensive with the engagement between the master and the deserting seaman, involving complicated inquiries whether, upon the whole, the desertion has caused the master any expense not ultimately adeemed by other savings in the course of the voyage. An expense was none the less caused to the master by engaging the substitute in September, although another expense was saved to the master at another date by, it is true, the same cause, the desertion. If it had been intended to sweep both those matters into the one account

so as to ascertain a balance at the end, language would have been employed connoting a debtor and creditor survey of the entire transactions of this protracted voyage. If the word "expense" were used in a sense sufficiently wide to support the argument for the Crown in *Deacon v. Quayle* it appears to me that would be a sense so wide that in *Neate v. Wilson* the ship-owner would be entitled to reimbursement of the amount that might be claimed in an action for breach of contract by detaining the vessel at the port of loading. The suggestion made when first the reimbursement account in *Neate v. Wilson* was presented to the proper officer was the ordinary suggestion that damages by way of demurrage to the extent of 25*l.* ought to be allowed because the ship was detained one day. That is a class of claim which is frequently made in a civil action, and it entails an investigation of such matters as the ship's running expenses on the one hand, coal, wages, provisions and so forth, plus insurance and interest on capital sunk, and, on the other hand, freight earned and received at the port of discharge; further, allowance has to be made for the uncertainties of the voyage, for although the ship may appear to have been detained one day in port she may thereby have escaped many more days' detention by adverse winds and so forth. The argument for the Crown in the second case convinces me that that sort of inquiry was never intended. What is intended—and the second case illustrates it very well—is that those expenses which are directly caused to the owner or master by the desertion, not confined to the excess wages paid to the substitute but other expenses due to this desertion, should be reimbursed.

With regard to the facts of the two cases, applying the view I take of the sections, the matter can be rapidly disposed of. The magistrate, in considering the question whether the excess expense of the substituted seamen engaged in September in San Francisco was an expense caused by the desertion, had to consider the question of causation. That is a question of fact. The tribunal which decides that question of fact must direct itself correctly in law, but it has not been suggested in this matter that there is any principle of law which says that the engagement of a substituted seaman would be too remote to be a legal

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consequence of the original desertion. Therefore, to my mind, the decision of the magistrate is conclusive. But I would further say that it seems to me to be an inevitable conclusion which as a matter of mercantile experience one must draw, because the seamen who deserted were engaged to serve the whole round voyage; the intermediate employment of the ship on this voyage must be left to the owner; and it is often arranged by cablegram and at a time when the master himself is at sea and is not aware what his next employment is going to be. It is true that the combination of employment as a hulk for six months with a homeward charter is somewhat unusual, but it is a legitimate employment, and had this vessel been detained by some necessity for repairs or by taking the opportunity to prepare her to pass some portion of one of her Lloyd's surveys whilst waiting for another engagement, or had she been making a ballast voyage down the coast and then returning to San Francisco to ship autumn wheat, this interval of time would have been part of the service of the seamen, and the number of men to be engaged would be dependent upon the service that was to be performed. When the vessel makes her final homeward ocean voyage her complement must be made up, but in the meantime there is no necessity or obligation to do so.

With regard to the other case, *Neate v. Wilson*, the 4*l.* 16*s.* 2*d.* per diem is a claim as to which it cannot be said that the expenditure of that sum in paying the crew was caused by the desertion. Independently of the desertions the crew had to be paid just the same. The same is true of the 1*l.* 16*s.* 3*d.*, and although it may be said the voyage was prolonged by one day's delay in sailing and therefore the master had to pay voyage expenses on an extra day at the end, that is a matter of uncertainty to be considered in connection with damages and not in connection with expenses directly caused. I take the same view of the expenditure on coal, because although the facts are not perhaps as clear as they might have been, it would appear that the expenses were all treated in the same way, and that it was said "Since we had another expenditure of coal in the course of our voyage, that ought to be treated as part of the sum that we are to be

reimbursed." The voyage might have taken in any case long enough to involve precisely the same coal bill as before. I think the claim in the second case was in principle one for damages for detention of the vessel in port, whereby the voyage was prolonged, and the profit diminished, and consequently those expenses are not included in the expenses caused by the desertion. The pilotage and personal expenses in seeking substitutes, are all illustrations of the kind of expenses which come within the wording of the section. There is only one other observation. A point was made, but only faintly, upon the words "any sum shown" in sub-s. 3 of s. 28, but those words were eventually, and I think rightly, treated on both sides as equivalent to "any item shown." The word "sum" is used throughout, but it is manifestly not intended to be limited to the figures of the claim stated, but to refer to the claim for the item, both the words which indicate its nature and the words which indicate its amount.

BANKES J. I agree that the first appeal should be dismissed and that the second appeal should be allowed. The questions which have been argued before us on these two appeals depend upon what is the true construction of ss. 221 and 232 of the Merchant Shipping Act, 1894, and s. 28 of the Merchant Shipping Act, 1906. Sect. 221 deals with the offence of desertion by seamen. It provides first of all for the forfeiture of the effects and wages of a deserting seaman, and then proceeds to deal with the case where the owner has had to pay an increase of wages to a substitute procured to take the deserter's place. It is important to notice the particular form of words used in this part of the section. It speaks of any excess of wages paid by the master or owner to any substitute engaged at a higher rate of wages than the rate stipulated to be paid to the deserter. The excess spoken of here is an excess of wages paid to the substitute, which seems to me to limit the period of time over which a calculation of wages for the purposes of this section is to be made to the period during which wages are paid to the substitute. The only test indicated in the section as to what constitutes an excess is a comparison between the rate of wages paid to the

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substitute and the rate of wages payable to the deserter. If the former is higher than the latter, then according to the language of the section there is an excess of wages. The sum total of that excess will be determined when the period over which that excess is paid is ascertained. If this section had stood alone the owner's remedy to recover the excess would have been by action against the deserter. Sect. 232, however, provides that the owner shall have a further remedy, namely, a remedy by way of set-off, and it enacts that the owner may convert the deserter's effects into money, and out of that money and any forfeited wages he may reimburse himself any expenses caused by the desertion. Those expenses may, of course, include matters other than excess wages, but if they consist to any extent of excess wages the excess must, in my opinion, be ascertained in manner provided by s. 221. The section further provides that subject to this right of set-off the forfeited wages and the effects or their proceeds shall be paid into the Exchequer and carried to the Consolidated Fund. It is, I think, material to notice that the expenses which are referred to in this section are strictly limited. They are expenses and not damages. They are expenses caused by the desertion, and not expenses, to use a familiar expression, of and occasioned by the desertion.

We now come to s. 28 of the Act of 1906. This section provides machinery for carrying out the above-mentioned provisions by means of accounts to be furnished by the master to the Board of Trade, but it does not, in my opinion, extend the rights of an owner against the deserting seaman. These accounts are called respectively "delivery account" and "reimbursement account," and they are to contain, on the one hand, a statement of what would have been due to the seaman had he not deserted, and, on the other hand, a statement of the set-off claimed by the owner, which has been given to him under the provisions of the earlier statute to which I have already called attention.

We were invited to read these sections as though they provided for the taking of a voyage account in respect of wages in which account it would be ascertained, on the one side, what sum would have become payable to the deserter for the full voyage had he

not deserted, and, on the other side, an account of what sum would, but for the desertion, have become payable to the deserter down to the time of desertion, and what sum had become payable to the substitute for the remainder of the voyage. It was argued that no excess would arise under the section unless the two last-mentioned sums added together were greater in amount than the first-mentioned sum. I cannot so read the section, as I do not find in it any words which admit of any such interpretation.

If the above is the correct construction of the sections in question it follows that in *Deacon v. Quayle* there was an excess of wages paid by the owner or master to the substitutes who were engaged at a higher rate of wages than the rate stipulated to be paid to the deserters to the extent claimed by the owner and allowed by the magistrate, and that the matters sought to be introduced by the Board of Trade in order to shew that no such excess in fact existed are not matters which are under the statute admissible to establish a contrary conclusion.

I have nothing to add to what has been said in the case of *Neate v. Wilson* with regard to the character of the alleged expenses which it is sought to set off, because, in my opinion, having regard to the circumstances of the case, they were not expenses at all; they were damages and not expenses such as come within the strict language of the section to which I have already referred, and which limits the right of set-off or reimbursement to the expenses caused by the desertion.

Appeal in Deacon v. Quayle dismissed.

Appeal in Neate v. Wilson allowed.

Solicitors: *Solicitor to the Board of Trade; Botterell & Roche.*

NOTE.—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 28:

“(1.) If a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall subject to the provisions of this section—

“(a) as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind; and

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“(b) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer within forty-eight hours after the arrival of the ship at the port at which the voyage terminates accounts in a form approved by the Board of Trade, one (in this section referred to as the delivery account) of the effects and wages, and the other (in this section referred to as the reimbursement account) of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion, neglect to join his ship, or any other conduct constituting an offence under section two hundred and twenty-one of the principal Act. The master shall, if required by the proper officer, furnish such vouchers as may be reasonably required to verify the accounts.

“(3.) The master of the ship shall be entitled to be reimbursed out of the wages or effects any sums shown in the reimbursement account which appear to the proper officer or, in case of an appeal under this section, to a Court of summary jurisdiction to be properly chargeable, and for that purpose the officer, or, if necessary, in the case of an appeal, the Board of Trade, shall allow those sums to be deducted from the amount due on account of wages shown in the delivery account, and, so far as that amount is not sufficient, to be repaid to the master out of the effects

“Where the master of a ship whose voyage terminates in the United Kingdom is aggrieved by the decision of the proper officer as to the sums to be allowed as properly chargeable on his reimbursement account, and the amount in dispute exceeds ten pounds, he may appeal from the decision of the proper officer to a Court of summary jurisdiction.

“(4.) Where during the voyage of a ship two or more seamen have been left behind, the delivery and reimbursement accounts furnished as respects each seaman may at the option of the master of the ship be dealt with, as between him and the proper officer, collectively instead of individually, and in that case the master of the ship shall be entitled to be reimbursed, out of the total amount of the wages and effects of the seamen left behind, the total of the amounts allowed under this section as properly chargeable on the reimbursement accounts, and shall be required to deliver to the proper officer on account of wages only the sum by which the total of the amounts shown on the delivery accounts to be due on account of wages exceeds the total of the amounts allowed as properly chargeable on the reimbursement accounts.”

Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 221: “If a seaman lawfully engaged . . . commits any of the following offences he shall be liable to be punished summarily as follows:—

“(a) If he deserts from his ship he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned, and, also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate

stipulated to be paid to him; and also, except in the United Kingdom, he shall be liable to imprisonment

“(b) If he neglects to join his ship, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, shall be liable to imprisonment”

Sect. 232: “(1.) Where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement shall be paid into the Exchequer, and carried to the Consolidated Fund.”

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Factories and Workshops—Men's Workshop—Outworker—Particulars of Wages
—*Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 116, 157—Home Office Order, September 14, 1909.*

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Sect. 116, sub-s. 1 (c), of the Factory and Workshop Act, 1901, requires that in every textile factory the particulars of the rate of wages applicable to the work to be done shall be furnished to each worker; and by sub-s. 5 the Secretary of State may by Special Order apply the provisions of s. 116 to any class of workshops, and to any class of persons of whom lists may be required to be kept under the provisions of the Act relating to outworkers. By s. 157, Part VII. of the Act, which includes s. 116, shall not apply to men's workshops as therein defined.

By a Special Order dated September 14, 1909, the Secretary of State applied s. 116 to workshops where tailoring work was carried on, and to outworkers engaged in that work.

The respondent, who carried on the business of a tailor at certain premises which were a men's workshop within s. 157, was charged with an offence relating to an outworker under s. 116, sub-s. 1 (c), as applied by the Order of September 14, 1909:—

Held, that by reason of s. 157 the Order did not apply to a men's workshop, and that the respondent was, therefore, not guilty of the offence charged.

CASE stated by a metropolitan magistrate.

At the Marlborough Street Police Court an information was

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laid by the appellant, William Henry Seal, an inspector of factories, against the respondent, Theobald Alexander, trading as Alexander the Great, tailor, of 145, Oxford Street, in the city of Westminster, for that the respondent on April 26, 1911, being then the occupier of certain premises, the same being a workshop within the meaning of the Factory and Workshop Act, 1901, at 145, Oxford Street, W., did not furnish one Lewis Stenoff, an outworker employed by the respondent and paid by the piece, with a written or printed statement of the particulars of the rate of wages applicable to the work to be done by Stenoff as required by s. 116 of the Factory and Workshop Act, 1901, as applied by the Secretary of State by Special Order made on September 14, 1909.

At the hearing of the information the following facts were proved or admitted:—

The respondent was the occupier of a tailoring workshop at 145, Oxford Street, which was a men's workshop within the meaning of s. 157 of the Factory and Workshop Act, 1901.

On April 26, 1911, a certain article of wearing apparel was given out by the respondent to an employee named Lewis Stenoff to be made up. Stenoff was employed as an outworker for that purpose by the respondent and was paid by the piece. The article was given out to him from the said premises.

No written particulars of the rate of wages applicable to the work to be done, as required by the provisions hereinafter mentioned (if applicable), were given to Stenoff by the respondent.

By s. 116 of the Factory and Workshop Act, 1901 (which section is included in Part VII. of the Act), it is provided that “(1.) In every textile factory the occupier shall, for the purpose of enabling each worker who is paid by the piece to compute the total amount of wages payable to him in respect of his work, cause to be published particulars of the rate of wages applicable to the work to be done and also particulars of the work to which that rate is to be applied, as follows:—

“(a) (b)” (These sub-sections apply to weavers and are not applicable to the present case.)

“(c) In the case of every other worker, the particulars of the

rate of wages applicable to the work to be done by each worker shall be furnished to him in writing at the time when the work is given out to him ;

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“(5.) The Secretary of State, on being satisfied by the report of an inspector that the provisions of this section are applicable to any class of non-textile factories or to any class of workshops, may, if he thinks fit, by Special Order, apply the provisions of this section to any such class, subject to such modifications as may, in his opinion, be necessary for adapting those provisions to the circumstances of the case. He may also, by any such Order, apply those provisions, subject to such modifications as may, in his opinion, be necessary for adapting them to the circumstances of the case, to any class of persons of whom lists may be required to be kept under the provisions of this Act relating to outworkers and to the employers of those persons.”

By s. 107 (which is included in Part VI. of the Act) it is provided as follows:—

“In the case of persons employed in such classes of work as may from time to time be specified by Special Order of the Secretary of State—

“(1.) The occupier of every factory and workshop and every contractor employed by any such occupier in the business of the factory or workshop shall—

“(a) keep in the prescribed form and manner and with the prescribed particulars lists showing the names and addresses of all persons directly employed by him, either as workmen or as contractors, in the business of the factory or workshop and the places where they are employed ;

“(4.) This section shall apply to any place from which any work is given out and to the occupier of that place and to every contractor employed by any such occupier in connection with the said work, as if that place were a workshop.”

By a Special Order of the Secretary of State, referred to as the Home Work Order of April 10, 1911, which Order repeated an Order dated in 1907, the provisions of s. 107 of the Act were applied to the following (among other) classes of work, namely:—

“The making, cleaning, washing, altering, ornamenting, finishing, and repairing of wearing apparel.”

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By an Order of the Secretary of State dated September 14, 1909, and made in pursuance of s. 116 of the Act, it is provided as follows :—

“ The provisions of the said section ” (i.e., s. 116) “ shall apply, subject to the modifications hereinafter contained, to factories and workshops in which the undermentioned processes, or any of them, are carried on, and to outworkers employed in those processes and the occupiers and contractors by whom they are employed :—the making, altering, ornamenting, finishing, and repairing of wearing apparel ; and any work incidental thereto.

“ The said section shall be modified so as to read as follows :—
(1.) The occupier or contractor shall for the purpose of enabling each worker who is paid by the piece to compute the total amount of wages payable to him in respect of his work, cause to be published particulars of the rate of wages applicable to the work given out, and also particulars of the work to which that rate is to be applied, as follows :—(a) He shall furnish every worker with particulars of the rate of wages applicable to the work given out to him either, (i.) by furnishing him with a written or printed statement of such particulars when the work is given out to him ; or (ii.) in the case of persons employed in a factory or workshop, by exhibiting such particulars in the factory or workshop on a placard containing no other matter than the rates of wages applicable to the work done in the factory or workshop, and posted in a position where it is easily legible by the workers. (b) Such particulars of the work given out to each worker as affect the amount of wages payable to him shall be furnished to him in writing at the time when the work is given out to him. (c) The particulars either as to rate of wages or as to work, shall not be expressed by means of symbols.

“ (2.) If the occupier or contractor fails to comply with the requirements of this section, he shall be liable for each offence to a fine of not more than ten pounds, and, in the case of a second or subsequent conviction within two years from the last conviction for that offence, not less than one pound.

“ In this Order the term ‘ outworker ’ means—(a) Any workman employed in the business of a factory or workshop outside the

factory or workshop; whether directly by the occupier thereof or by any contractor employed by him. (b) Any workman employed by the occupier of any place from which work is given out or by a contractor employed by him in connection with the said work."

By s. 157 of the Act of 1901 it is provided that "The following provisions of this Act shall not apply to men's workshops, that is to say, workshops conducted on the system of not employing any woman young person or child there:— (4.) Part VII."

It was contended on behalf of the respondent that by reason of the last-mentioned provision there was no obligation upon him to give particulars of the rate of wages to Stenoff, inasmuch as the garment was given out to him from a men's workshop within the meaning of the said provision, and that therefore the provisions of s. 116, under which the respondent was summoned, did not apply, and that the Order of the Secretary of State did not in fact purport to apply, and could not be construed as applying, to a men's workshop provisions which the Act expressly enacted should not be so applied.

On behalf of the appellant it was contended that such obligations existed and were not affected by the said provision.

The magistrate held that the respondent's contention was correct, and he dismissed the summons with costs.

The question for the opinion of the Court was whether the decision of the magistrate was correct in law.

Rowlatt, for the appellant. By s. 116, sub-s. 5, of the Factory and Workshop Act, 1901, the Secretary of State may apply the provisions of s. 116 "to any class of persons of whom lists may be required to be kept under the provisions of this Act relating to outworkers and to the employers of those persons." Sect. 107, which provides for the keeping of lists of outworkers, has by the Order of April 10, 1911 (which repeated an Order of 1907), been applied to outworkers engaged in tailoring work. The question is whether the Order of September 14, 1909, applying s. 116 to those outworkers, applies to outworkers who are engaged by the occupier of a men's workshop, having regard to s. 157 of the Act, which says

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that Part VII. of the Act, which includes s. 116, but not s. 107, shall not apply to men's workshops. Sect. 116 deals with textile and non-textile factories, workshops, and also, in sub-s. 4, with outworkers; and there is nothing in s. 157 to say that s. 116, as modified by the Order of the Secretary of State, shall not apply to outworkers, although they may be working for the occupier of a men's workshop. An Order applying s. 116 to outworkers is not the same thing as applying it to a men's workshop. The Order of September 14, 1909, is a valid Order so far as outworkers are concerned, and the respondent should have been convicted.

Cecil Walsh, for the respondent. The Order of April 10, 1911, has no bearing on this case. The respondent was summoned for a breach of s. 116 as modified and applied by the Order of September 14, 1909. That Order in terms purports to apply s. 116 to workshops where the manufacture of wearing apparel is carried on, and to outworkers and the occupiers by whom they are employed. It is impossible to construe s. 116 as dealing with outworkers separately from the factory or workshop whence their work is supplied. The information charges the respondent as the occupier of a workshop. It is in fact a men's workshop, and the Secretary of State had no power to make an Order applying the provisions of s. 116 to a men's workshop. The respondent has, therefore, committed no offence.

Rowlatt replied.

PICKFORD J. This case raises a difficult question, involving the consideration of several sections of the Factory and Workshop Act, 1901, in connection with an Order of the Secretary of State made under the Act, but I have come to the conclusion that the decision of the magistrate was right.

The facts are very short. The respondent carries on the business of a tailor in what is found as a fact to be a men's workshop. He was summoned for that, being the occupier of those premises, he did not furnish to a person who was an outworker a written or printed statement of the particulars of the rate of wages applicable to the work to be done by that person. The respondent is liable, if at all, under an Order of the Secretary of State dated September 14, 1909, which purports to

apply the provisions of s. 116 of the Act of 1901, subject to the modifications contained in the Order, to "factories and workshops in which the undermentioned processes, or any of them, are carried on, and to outworkers employed in those processes and the occupiers and contractors by whom they are employed." [The learned judge read s. 116, sub-s. 5, and continued:] It is admitted that the first part of sub-s. 5 of s. 116 does not apply to this case, because the premises are a men's workshop and by s. 157 of the Act it is provided that Part VII. of the Act (which contains s. 116) shall not apply to men's workshops; but it is said that the latter part of sub-s. 5, which says that "the Secretary of State may also by any such Order apply" the provisions of s. 116 "to any class of persons of whom lists may be required to be kept," does apply to this case because the trade carried on by the respondent is a trade which by another Order of the Secretary of State has been brought within s. 107, the section which provides for the keeping of lists of outworkers. It is contended, therefore, that there was power to make the Order of September 14, 1909, and to apply the provisions of s. 116 to outworkers in a business carried on in a men's workshop, because they are a class of persons of whom lists may be required to be kept.

I have already pointed out that the summons is stated to be against the respondent as occupier, but I do not think any very serious argument against the appellant can be founded upon the fact that the person who drafted the summons thought that occupation of a workshop was necessarily an ingredient of the offence. The ground upon which I base my decision is that this Order is really in conflict with s. 157, in that it purports to do indirectly what that section expressly prohibits from being done. It is true that the worker in question was an outworker and was therefore not actually employed in a men's workshop, but he was a person who was working in connection with the men's workshop, and the penalty is sought to be recovered from the man who was occupying and carrying on business in a men's workshop. The case for the appellant therefore involves the indirect application of s. 116 to a men's workshop, which is contrary to the express enactment contained in s. 157.

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SEAL

v.

ALEXANDER.

Pickford J.

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I am of opinion that this Order does not apply to men's workshops, and that this appeal must be dismissed.

AVORY J. I agree that the magistrate was right in dismissing this information. I am not sure whether we ought to hold that he was right on the ground that the Order of September 14, 1909, does not apply to this case, or upon the ground that the Order itself is ultra vires. I am inclined to think that the Order itself on the face of it is ultra vires because it neglects to except from its operation the exception introduced into the Act by s. 157; in other words the Order upon its face would read as if it did apply to the case of a men's workshop within the definition in s. 157. The respondent was summoned as the occupier of premises being a workshop for that he did not furnish to an outworker particulars of the rate of wages applicable to the work to be done. For the purpose of this summons I think that the words "being a workshop" might properly have been omitted. I do not think that the words "being the occupier of certain premises" could properly be omitted, because even assuming the argument for the appellant to be sound, if the respondent had not been described as the occupier, he certainly ought to have been described under s. 116 as the employer of certain persons, namely, outworkers. That section gives power to the Secretary of State to make Orders applying the section to a class of persons called outworkers and to the employers of those persons, and it is only by applying the section to the employers of those persons that the employer becomes liable to a penalty under the Order. In this case it is as employer of certain outworkers that the respondent was alleged to be liable to a penalty. As employer of those persons he was in fact the occupier of a men's workshop, and as occupier of a men's workshop, s. 157 exempts him from the provisions of Part VII. of the Act. It is to be observed that Part VII. only consists of two sections, ss. 116 and 117, and in effect, therefore, it is the same as if the Act had said that s. 116 shall not apply to a men's workshop. The effect of this Order is to make s. 116 apply to a men's workshop. Whether it does it directly or indirectly is immaterial. I am of opinion that the Order was

either ultra vires because it does not notice the exception created by the Act in s. 157, or, if it is not ultra vires, the Order does not apply in this case to the respondent because he was in fact the occupier of a men's workshop and the employer of persons who were outworkers at that workshop."

LUSH J. I think that the magistrate was right, not only in the conclusion at which he arrived, but in the reasons which he gave; and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *J. B. & G. S. Beirnstein.*

F. O. R.

[IN THE COURT OF APPEAL.]

COLCHESTER CORPORATION *v.* GEPP;
KING, THIRD PARTY.

C. A.

1911

Dec. 9.

Highway — Extraordinary Traffic — Repairs — Extraordinary Expenses — Average Expenses of repairing similar Highways — Particulars — Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23.

In an action by a highway authority to recover extraordinary expenses incurred in repairing a highway by reason of damage caused by excessive weight and extraordinary traffic thereon, it was alleged in the statement of claim that the extraordinary expenses amounted to 1577*l.* 11*s.* 9*d.*, and that that sum was arrived at by deducting 217*l.* 8*s.* 4*d.*, the average expense of repairing similar highways in the neighbourhood, from 1795*l.* 0*s.* 1*d.*, the actual expense of repairing the highway in question:—

Held (affirming the decision of Scrutton J. at chambers), that the plaintiffs must give particulars of the names of the similar highways, and of the average expense of repairing each of them.

Billerica Rural District Council v. Poplar Union [1911] 2 K. B. 801, applied.

Dictum of Cozens-Hardy M.R. in *Bromley Rural District Council v. Chittenden* (1906) 70 J. P. 409, not followed.

APPEAL from chambers.

The action was brought by the plaintiffs, as highway authority, to recover extraordinary expenses incurred in repairing

C. A. a certain road by reason of damage caused by excessive weight
 1911 and extraordinary traffic thereon in connection with a contract
 COLCHESTER entered into by the visiting committee of the lunatic asylum
 CORPORATION for the administrative county of Essex and the borough of
 v. Colchester (of which body the defendant was clerk) with one
 GEPP. King, a contractor, for the erection of certain buildings.

The defendant, claiming to be entitled to an indemnity from King, served him with a third party notice.

Paragraph 6 of the statement of claim was as follows: "On or about the 22nd of April, 1910, the plaintiffs' surveyor issued a certificate in respect of Mile End Road" (one of the roads in question) "in accordance with section 23 of the Highways and Locomotives (Amendment) Act, 1878, to the effect that, having regard to the average expense of repairing the highways in the neighbourhood, extraordinary expenses to the amount of 1577*l.* 11*s.* 9*d.* had been incurred by the plaintiffs in repairing the said highway from the 12th of July, 1909, to the 31st of March, 1910, by reason of the damages referred to. The said certificate is correct, and the sum of 1577*l.* 11*s.* 9*d.* is arrived at by deducting 217*l.* 8*s.* 4*d.*, being the average expense for a like period of repairing similar highways in the neighbourhood, alternatively of repairing the said highway, from 1795*l.* 0*s.* 1*d.*, the actual expense incurred in repairing the same."

The plaintiffs were ordered by a Master, on the application of the third party, to deliver "particulars of paragraph 6 of the statement of claim showing how the average expense for the period from the 12th of July, 1909, to the 31st of March, 1910, making 217*l.* 8*s.* 4*d.*, and relative to Mile End Road, is made up, and giving the names of 'the similar highways in the neighbourhood' referred to, and the average expense of the repair in respect of each such highway."

The particulars delivered by the plaintiffs stated that the sum of 217*l.* 8*s.* 4*d.* was made up by dividing by 5 the total expenses actually incurred in repairing the Mile End Road during the five years preceding July, 1909 (particulars of which had previously been delivered), and the particulars continued: "The said sum of 217*l.* 8*s.* 4*d.* being the average for one year of the actual expenses incurred in the repair of the said road

during the five years preceding July, 1909, is alleged by the plaintiffs to represent fairly the average annual expenses of repairing the same lengths of similar highways in the neighbourhood of Colchester, but the words 'similar highways' mentioned in paragraph 6 of the statement of claim do not refer to any particular highways, but refer generally to any and all highways in the neighbourhood of Colchester, which may be similar to Mile End Road so far as the expense of keeping them in repair is concerned."

The plaintiffs were then ordered to deliver further particulars of the names of the similar highways and the average expense of repairing them; otherwise no evidence was to be given at the trial of the average expense of repairing any specific highways alleged to be similar to the Mile End Road. The plaintiffs appealed from this order, and also, by leave, from the original order for particulars.

Scrutton J., at chambers, dismissed both appeals, but gave leave to the plaintiffs to appeal to the Court of Appeal.

Hon. Malcolm Macnaghten, for the plaintiffs. The plaintiffs should not have been ordered to give any particulars, but in any event they ought not to be required to give any further particulars. The issue of a certificate by the surveyor as to the amount of extraordinary expenses incurred in respect of the highway in question, by reference to the average expense of repairing the highways in the neighbourhood, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, is a condition precedent to the right to bring the action, but, in the words of Cozens-Hardy M.R. in *Bromley Rural District Council v. Chittenden* (1), "the average expense of repairing the highways in the neighbourhood is not one of the questions in issue in the action." If, as will be contended at the trial is the case here, there are no roads in the neighbourhood comparable with the particular road in question, the plaintiffs are entitled to prove their case by some other means than a comparison with other roads. The allegation in the statement of claim as to the average expense of repairing other similar highways may therefore be regarded as an

(1) 70 J. P. 409.

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C. A. immaterial allegation. *Billericay Rural District Council v. Poplar*
 1911 *Union* (1), which at first sight seems opposed to the plaintiffs'
 COLCHESTER contention, is really distinguishable, for in that case there was
 CORPORATION no evidence with regard to the average expenses of repairing
 v. the highway in question. [He also referred to *Lord Aveland v.*
 GEPP. *Lucas*. (2)]

Ernest Todd, for the third party, was not called upon to argue.

BUCKLEY L.J. In my opinion the order appealed from was rightly made. The question arises under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, the action being brought to recover in respect of a certain highway what are called in the Act extraordinary expenses. The plaintiffs in paragraph 6 of the statement of claim have set out the certificate issued by their surveyor in respect of the road in question, which states that "having regard to the average expense of repairing the highways in the neighbourhood extraordinary expenses to the amount of 1577*l.* 11*s.* 9*d.* had been incurred by the plaintiffs in repairing the said highway" between certain dates by reason of the damage caused by the defendant. The statement of claim then alleges that the certificate is correct and that "the sum of 1577*l.* 11*s.* 9*d.* is arrived at by deducting 217*l.* 8*s.* 4*d.*, being the average expense for a like period of repairing similar highways in the neighbourhood, alternatively of repairing the said highway," from 1795*l.* 0*s.* 1*d.*, the actual expense incurred in repairing the same. The plaintiffs were ordered to give certain particulars, and in the particulars given they say that the 217*l.* is made up by dividing by 5 the total expense actually incurred in repairing this particular road during the preceding five years, and, further, that the sum of 217*l.*, being the average for one year of the actual expenses incurred in the repair of this road, is alleged by the plaintiffs to represent fairly the average annual expense of repairing the same lengths of similar highways in the neighbourhood of Colchester, "but the words 'similar highways' mentioned in paragraph 6 of the statement of claim do not refer to any particular highways, but refer generally to any and all highways in the neighbourhood of

(1) [1911] 2 K. B. 801.

(2) (1879) 5 C. P. D. 211.

Colchester, which may be similar to Mile End Road," the road in question, "so far as the expense of keeping them in repair is concerned." The plaintiffs therefore have taken up this position: they allege in their statement of claim that 217*l.* is the average expense of repairing the highway or the similar highways in the neighbourhood, but by their particulars they say that is not the fact, that they have not endeavoured to ascertain what is in fact the average cost of repairing other highways; they have taken out the expense of repairing this particular road, and they say that the same figure would be arrived at if the average expense of repairing all similar roads was taken. To this the defendant replies that he wants to test this allegation, and that what the defendant wants are particulars of the names of the similar highways referred to and the average expense of repairing each of those highways. The question which we have to determine is whether the plaintiffs ought to give those particulars.

I agree that some justification for the position taken up by the plaintiffs is to be found in a passage in the judgment of Cozens-Hardy M.R. in *Bromley Rural District Council v. Chittenden*. (1) That case came before the Court of Appeal on an interlocutory application and was decided by a Court consisting of two members, and I think that in deciding the present case we ought rather to have regard to the recent decision in *Billericay Rural District Council v. Poplar Union* (2), in which judgments were delivered by all three members of this Court. In that case all the members of the Court were of opinion that the words at the end of s. 23, "the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred," were words which either by reference introduced the earlier words of the section, or which upon a true construction of the section must be read as leaving it to the Court to determine the amount of the expenses on a similar principle to that on which the surveyor makes out his certificate; in other words that the Court which is adjudicating upon the matter is to have regard to the average expense of repairing similar highways in the neighbourhood. It is obvious, therefore, that the particulars

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(1) 70 J. P. 409.

(2) [1911] 2 K. B. 801.

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which the defendant wants are particulars of average expense of repairing, not the highway which is alleged to have been damaged, but of the other highways in the neighbourhood, which we thought in the *Billericay Case* (1) meant highways in the neighbourhood comparable with the highway in question, as for instance, by bearing a similar weight of traffic. In my opinion the original order for particulars and the order for further particulars were rightly made, and this appeal must be dismissed.

KENNEDY L.J. I am of the same opinion in spite of the very clear argument which has been addressed to us by counsel for the plaintiffs. I think that he was justified in drawing some support for that argument from the judgment delivered in *Bromley Rural District Council v. Chittenden* (2); but it is clear that, in so far as he bases his argument upon that case, he is bound to admit that the *Billericay Case* (1) is both a later decision on the same point and one which is adverse to his contention. With regard to this particular case, I wish to say further that, whether it were right or wrong for the tribunal which is deciding the question to take into consideration the average expense of repairing other similar highways in the neighbourhood, we have here an allegation in the statement of claim as to 217*l.* being the average expense of repairing those other highways. That must be assumed to be a material allegation, for, if it is not material, it ought not to have been pleaded. But being alleged as a material matter, it is only right and in accordance with the practice as to the ordering of particulars that the defendant, or rather the third party, should be given particulars shewing how the figure of 217*l.* is arrived at. It seems to me, therefore, that the order for further particulars as made by the Master and affirmed by the judge at chambers was rightly made, and this appeal consequently fails.

Appeal dismissed.

Solicitor for plaintiffs : *Richard Free, for H. C. Wanklyn, Colchester.*

Solicitor for third party : *G. M. Davey.*

(1) [1911] 2 K. B. 801.

(2) 70 J. P. 409.

[COURT OF CRIMINAL APPEAL.]

1911

Dec. 19.

THE KING v. HOLDEN.

Criminal Law—Forgery—Partnership—Firm Name—Bill of Exchange—Acceptance in Firm Name—Acceptance in the Name of any other Person—Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 24.

By s. 24 of the Forgery Act, 1861, it is provided that whosoever with intent to defraud shall accept any bill of exchange by procuration or otherwise in the name of any other person without lawful authority or excuse shall be guilty of felony.

The prisoner was in partnership with one Hugh Fullerton under the style or firm of Holden and Fullerton. With intent to defraud and without lawful authority or excuse he accepted a bill of exchange in the manner following: "payable at the L. and W. Bank Limited, London, Holden and Fullerton":—

Held, that, having accepted the bill in the name of his partner, he was properly convicted, under the above enactment, of having accepted it in the name of another person within the meaning thereof.

APPEAL upon the certificate of Avory J. under s. 3 (b) of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23).

The certificate of the learned judge set out the following facts:—

The appellant, Frank Holden, was indicted at the Manchester Assizes under s. 24 of the Forgery Act, 1861 (1), for accepting a bill of exchange in the name of another person without lawful authority or excuse. He was a member of the firm of Holden and Fullerton. The bill was accepted by him in the name of Holden and Fullerton for the purpose of raising

(1) Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 24: "Whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note . . . by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note . . . so drawn, made, signed, accepted, or indorsed by procuration or otherwise, without lawful autho-

rity or excuse, as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

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money for his own individual benefit, the proceeds to be applied to such purpose.

The jury found (1.) that he had not authority in fact to accept the bill; (2.) that he had no honest belief at the time that he had authority to do so; and (3.) that he intended to defraud at the time when he signed the name on the bill.

The learned judge was of opinion that this was not an acceptance in the name of another person within the meaning of the section, but as the point appeared not to have been previously decided, and in view of the contention of counsel for the prosecution that the appellant had in fact accepted in the name of Fullerton without his authority and thereby made Fullerton liable to a bona fide holder, he directed the jury to convict and gave leave to appeal.

Langdon, K.C. (J. C. Jackson with him), for the appellant. The bill of exchange was not accepted in the name of any person. "Person" here means person known to the law. Holden and Fullerton is not the name of any person known to the law. It is the name of a firm or partnership; but a firm or partnership is not in English law a person. The firm name is not the name of either of the partners: *Levy v. Walker*. (1) It is a partnership asset to which both partners are entitled as joint tenants: *Banks v. Gibson* (2); *Ex parte Corbett, In re Shand*. (3) When therefore the appellant accepted the bill in the name of Holden and Fullerton he used a name which was as much his own name as it was his partner's. That is not accepting a bill in the name of any other person within the meaning of s. 24 of the Forgery Act, 1861.

A. S. Carr, for the Crown, was not called upon to argue.

The judgment of the COURT (Lord Alverstone C.J., Hamilton and Bankes JJ.) was delivered by

HAMILTON J. The appellant was indicted under s. 24 of the Forgery Act, 1861, for feloniously forging an acceptance of a bill of exchange in the names of Holden and Fullerton with

(1) (1879) 10 Ch. D. 436.

(2) (1865) 34 Beav. 566.

(3) (1880) 14 Ch. D. 122, at p. 126.

intent to defraud. The judge put three questions to the jury: (1.) Had the defendant on the evidence authority to accept the bill in the name of Holden and Fullerton? (2.) Did the defendant accept the bill in the name of the firm in the honest belief that he had authority to do so? (3.) Did the defendant sign the name of Holden and Fullerton with intent to defraud? The jury answered the first two questions in the negative and the third question in the affirmative. The point being then taken that this was not an offence within s. 24 of the Act, the judge raised the question of law under a certificate in which he said, "I was of opinion that it was not an acceptance in the name of another person within the meaning of the section, but, as the point does not appear to have been previously decided, and in view of the contention of counsel for the prosecution that the defendant had in fact accepted in the name of Fullerton without authority and thereby made Fullerton liable to a bona fide holder, I directed the jury to convict and gave leave to appeal."

The case comes before us as one of first impression. The appellant with intent to defraud accepted a bill of exchange "payable at the London and Westminster Bank Limited, London, Holden and Fullerton." In so doing he involved in a contractual liability two persons of whom Holden was the name of one and Fullerton that of the other, Fullerton being, as the words might convey, his partner under certain articles of partnership. It is said that he did not accept this bill in any name other than his own. He used his own name, Holden, but he also used the name of Fullerton, and none the less so because neither the christian names nor the initials were revealed, and the conjunction "and" appeared between the names. It is said that "Holden and Fullerton" is not the name of any person; that it is a "firm name," the description of a "firm" within the meaning of s. 4 of the Partnership Act, 1890; that a firm is a trading concern, which is not in England, as it is in Scotland, a separate legal entity; and therefore the name of a firm is not the name of any person. This construction does some violence to the language and to some extent nullifies the intention of s. 24 of the Forgery Act, 1861. That enactment was passed in consequence of the decision in *Reg. v.*

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White (1), where it was held that a person who signed the name of another per procuration could not be convicted under s. 3 of the statute 11 Geo. 4 & 1 Will. 4, c. 66. If s. 24 of the Act of 1861 did not hit the case of a man signing a firm name by procuration, e.g., Holden and Fullerton per proc. A. B., but only applied where the individual names of the partners were signed, e.g., Frank Holden and Hugh Fullerton per proc. A. B., the result would be, while punishing some of these frauds, to leave others unpunished. But apart from that the circumstances of this case seem to us to bring it within the very words of s. 24. In our opinion the writing was an acceptance in the name of another person, to wit, Fullerton, none the less because it also intimates that Fullerton was in partnership with Holden, the person writing the acceptance. Then it was argued that the appellant had not used the name of another person because Holden and Fullerton was a trade name, an asset to which the appellant had as much right as Fullerton himself had. No doubt a firm name may be a partnership asset to which each partner has a right; but what answer is that? This is not a case involving the rights of the partners to the partnership property; it is a plain case of one partner writing the name of the other as acceptor of a bill of exchange with the object and effect of making his partner personally liable at the suit of any one into whose hands the bill might come without notice of his want of authority to accept bills in the name of the firm. The rights of the partners inter se to the partnership assets have no bearing upon such a case. That contention therefore cannot prevail.

Lastly, it was said that there was no acceptance "by procuration or otherwise" within the meaning of the enactment. But if there was no acceptance "by procuration" there was an acceptance "otherwise," namely, by a grave misuse of that authority which one partner has to do certain acts on behalf of the firm. If the firm name had been the Anonymous Trading Company or some other name not in any way indicating the partners, it would have been a different question whether an indorsement in that name would have supported a conviction.

(1) (1847) 2 Car. & K. 404.

In the circumstances of the present case every word in the section is clearly satisfied. The firm name was not in itself the name of any person other than the partners because, in the words of Farwell L.J. in *Sadler v. Whiteman* (1), "The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order XLVIII.A it may be used for the sake of suing and being sued." There was therefore an acceptance with intent to defraud of a bill of exchange otherwise than by procuration in the name of another person. The conviction must stand and the appeal must be dismissed.

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Appeal dismissed.

Solicitor for appellant: *E. G. P. Worsley, Manchester.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

(1) [1910] 1 K. B. 868, at p. 889.

W. H. G.

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Dec. 18, 19.

[COURT OF CRIMINAL APPEAL.]

REX v. ACASTER.

REX v. LEACH.

Criminal Law—Evidence—Compellable Witness—Wife of Person charged—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69)—Punishment of Incest Act, 1908 (8 Edw. 7, c. 45)—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4.

By s. 4 of the Criminal Evidence Act, 1898, it is enacted that the wife or husband of a person charged with an offence under any enactment mentioned in the schedule to the Act may be called as a witness either for the prosecution or defence and without the consent of the person charged:—

Held, that the effect of this enactment is, in the cases to which it applies, to make the wife or husband of the person charged a compellable as well as a competent witness.

THESE two appeals were heard together.

REX v. ACASTER.

At the autumn assizes for the West Riding of Yorkshire on November 25, 1911, the appellant Frederick Acaster was indicted under s. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69) (1), for that he did on May 17, 1911, unlawfully and carnally know Annie Eliza Acaster, a girl above the age of thirteen years and under the age of sixteen years, to wit, of the age of fifteen years.

At the trial before Phillimore J. the deposition of Eliza Ann Acaster, the wife of the appellant, as taken before the magistrates was read, she being too ill to travel and give evidence at the trial. In her deposition she said "I want to shield my husband."

The jury returned a verdict of guilty, and the appellant was sentenced to a term of fifteen months' imprisonment with hard labour.

He appealed from this conviction.

REX v. LEACH.

At the autumn assizes for the county of Stafford on November 24, 1911, the appellant Richard Leach was indicted

(8) See note on p. 494, post.

under s. 1 of the Punishment of Incest Act, 1908 (8 Edw. 7, c. 45) (1), for that on October 22, 1911, he did unlawfully and carnally know Olga Mary Leach, a girl under the age of thirteen years, namely, eleven years and ten months, she being to his knowledge his daughter.

At the trial before Pickford J. the wife of the appellant was called as a witness by counsel for the prosecution. She objected to give evidence, but after discussion and argument the learned judge ruled that she was a compellable witness, and her evidence was accordingly heard.

The jury returned a verdict of guilty, and the appellant was sentenced to a term of three years' penal servitude.

He gave notice of appeal to the Court of Criminal Appeal on the following question of law, that is to say, that the evidence of his wife called as a witness for the prosecution was wrongly admitted against him, she having refused to give evidence and having been compelled by the judge to do so, not being a compellable, although a competent, witness.

W. Valentine Ball, for the appellant Acaster; *V. Graham Milward* and *F. Baber*, for the appellant Leach. At common law husband and wife could not be witnesses for each other, because their interests were absolutely the same; nor against each other, because it was contrary to the legal policy of marriage: Buller's Nisi Prius, 286a; or because, being as one and the same person in affection and interest, they could no more give evidence for one another in any case whatsoever than for themselves: Hawkins' Pleas of the Crown, bk. ii., ch. 46, s. 67, p. 600 (Curwood); *Rex v. Inhabitants of Cliviger* (2); *Davis v. Dinwoody* (3); *Rex v. Inhabitants of All Saints, Worcester*. (4)

There were certain exceptions to this rule, for instance, in cases where a personal violence has been committed by the one upon the other; also a wife could exhibit articles of the peace against her husband and give evidence in support thereof: Taylor on Evidence, § 1370 (10th ed., vol. 2, p. 973).

The Evidence Act, 1851 (14 & 15 Vict. c. 99), made the parties

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(1) See note on p. 494, post.

(2) (1788) 2 T. R. 263.

(3) (1792) 4 T. R. 678.

(4) (1817) 6 M. & S. 194.

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to a civil action competent witnesses, but the husband or wife of either of the parties was still an inadmissible witness unless husband and wife were suing or being sued jointly; and by s. 3 of the Act it was provided that nothing in the Act should in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. From the date of that statute until the present time the distinction between a competent and a compellable witness has been continually before the minds of the Legislature and the Courts.

The Evidence Act, 1877 (40 & 41 Vict. c. 14), provided that on the trial of any indictment or other proceeding for the non-repair of a public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such an indictment or proceeding, and the wife or husband of any such defendant, should be admissible witnesses and compellable to give evidence.

A number of statutes will be found collected in the note to Taylor on Evidence, § 1372A (10th ed., vol. 2, p. 977), in which the husbands or wives, as the case may be, of persons charged have been made "competent," or "competent but not compellable," or "competent and compellable" witnesses. By s. 20 of the Criminal Law Amendment Act, 1885, it was expressly enacted that the husband or wife of a person charged under the Act should be a competent but not a compellable witness. Did the Legislature intend to repeal that enactment by a provision that the wife or husband of a person charged "may be called as a witness"? If that had been intended it would surely have been expressly enacted that the husband or wife should be a competent and compellable witness. That phrase was well known and well understood. To say that a person may be called as a witness is not to say that when called he or she is necessarily compellable to give evidence: *Rex v. Inhabitants of All Saints, Worcester* (1); in fact, that was the actual position of the husband or wife of the defendant charged with an offence under the Prevention

of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), and under the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), which repealed and replaced it. It was enacted by s. 12 of the earlier Act, and re-enacted by s. 12 of the later, that in any proceeding against any person for an offence under the Act the wife or husband of such person might be "required to attend to give evidence as an ordinary witness" and should be "competent but not compellable to give evidence." At the passing of the Criminal Evidence Act, 1898, it was not clear whether the wife of a defendant charged with an offence under any of the statutes specified in the schedule to the Act could be called for the prosecution against the will of the person charged. The Act by s. 4 removed that doubt, but left the competence and compellability of the witness where they were before the Act: see Russell on Crimes, 7th ed., vol. 2, p. 2277; Archbold's Criminal Pleading, 24th ed., p. 465.

Horace Wilson, for the Crown in *Acaster's Case*; *Snagge*, for the Crown in *Leach's Case*. It is clear when one considers the state of the law at the date of the passing of the Criminal Evidence Act, 1898, that the words "may be called as a witness" mean "may be called as an ordinary witness," i.e., one who is competent and compellable. Otherwise there was no object in including in the schedule to that Act either the Criminal Law Amendment Act, 1885, or the Prevention of Cruelty to Children Act, 1894.

[They were stopped.]

The judgment of the COURT (Lord Alverstone C.J., Hamilton and Bankes JJ.) was delivered by

LORD ALVERSTONE C.J. The point which we have to decide arises in *Leach's Case* only. In *Acaster's Case* no objection was taken by or on behalf of the prisoner or his wife that the latter was not compellable to give evidence. It is common ground that she was a competent witness, and therefore her evidence was admissible, unless we are to assume that if she had been present at the trial she would have objected to give evidence, an assumption which we are not disposed to make. Notwithstanding this, we heard counsel for *Acaster* because we desired

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all available assistance in deciding the point which does arise in *Leach's Case*.

The question is one which affects proceedings under certain Acts of Parliament, some of which appear in the schedule to the Criminal Evidence Act, 1898. To the list of those which originally appeared one has been added, the Punishment of Incest Act, 1908, and of that list one of the Acts, the Prevention of Cruelty to Children Act, 1894, has been repealed, and is now replaced by Part II. of the Children Act, 1908, and the First Schedule to that Act. The question is whether a wife is a compellable witness against her husband in proceedings under the statutes which I have mentioned. In the opinion of the Court she is. It must be admitted that the draftsmanship of the Criminal Evidence Act, 1898, is not very satisfactory. Commenting upon its language in the case of *Reg. v. Brazil* (1), Wills J. professed himself at a loss to understand it. Afterwards I saw Wills J. and offered an explanation, which satisfied that learned judge and which I am about to give now.

The question depends upon the meaning of the words in s. 4, sub-s. 1, of the Criminal Evidence Act, 1898, "may be called as a witness either for the prosecution or defence and without the consent of the person charged." Before this enactment there were various statutes which allowed the defendant to be called in certain circumstances upon certain charges. In most cases he could only be called by his own consent. In many cases the wife or husband of the defendant, as the case might be, was in the same position as the defendant. There were also some Acts which made the defendant a compellable witness, and even made the wife a compellable witness for the prosecution. In these circumstances the Legislature might have made s. 4 applicable to all or any of these Acts. The practical difficulty in the way of applying that section to all the Acts was that they contained many and various provisions, and that to effect the intended object each Act would have to be separately considered and separately dealt with. Therefore the Legislature selected those cases in which it was necessary in the interests of justice that the wife or husband of the defendant should give evidence

for the prosecution, for example, the enactment contained in s. 3 of the Vagrancy Act, 1824, punishing a man for neglecting to maintain or deserting his wife or any of his family, the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1894. With regard to those Acts the Legislature by s. 4 of the Criminal Evidence Act, 1898, enacted that the wife or husband of a person charged "may be called as a witness either for the prosecution or defence and without the consent of the person charged." In order to arrive at the meaning of those words, it is necessary to consider how the matter stood at the date of the passing of the Act of 1898 with regard to the two statutes of 1885 and 1894 which I have just mentioned. It is to be presumed that the Legislature by the Act of 1898 intended to make some amendment in the then existing law. As to that, there can be no doubt that, before the passing of this Act, for offences under the Criminal Law Amendment Act, 1885, the wife of a person charged, although a competent, was not a compellable witness. That is clear from s. 20 of the Act of 1885. The Prevention of Cruelty to Children Act, 1894, enacted in s. 12 that "In any proceeding against any person for an offence under this Act or for any of the offences mentioned in the schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence." Under that Act therefore although a wife might be required to attend at the trial, yet she clearly could not be compelled to give evidence. In both these cases, therefore, a wife although a competent was not a compellable witness. What then was the intention of the Legislature in enacting that in those cases the wife or husband "may be called as a witness"? It cannot have been the intention to leave the law as it was before; yet this is in effect the contention of the appellants.

Seeing that this enactment uses language different from that used in former statutes, it seems to us that the Legislature as regards the scheduled Acts intended to make the wife or husband, as the case may be, a compellable as well as a competent witness. This view was expressed by a great authority,

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Sir H. Poland in his preface to Allen's Criminal Evidence Act, 1898, published shortly after the Act was passed,[†] where the following passage occurs on p. xxvi:—"The result is that there is now this strange anomaly still remaining: If a father half kills his child, or his wife's child by a former marriage, and he is charged with an offence under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), his wife can be compelled to give evidence against him, but if he kills it outright and is charged with murder or manslaughter, she cannot give evidence against him, even if willing to do so." Roscoe's Criminal Evidence, 13th ed., p. 104, Harris's Criminal Law, 11th ed., p. 396, and Stone's Justices' Manual, 43rd ed., p. 355, note *h*, are to the same effect. Archbold's Criminal Pleading, 24th ed., at p. 465, expresses an opinion to the contrary, but cites cases which seem to shew that the more usual practice has been to admit the evidence. In our opinion the language of s. 4 is sufficient to make the husband or wife as the case may be an ordinary, and therefore a compellable, witness. The appeals must therefore be dismissed.

Appeals dismissed.

Solicitor for appellant Acaster: *The Registrar of the Court of Criminal Appeal.*

Solicitors for appellant Leach: *Mills, Curry & Gaskell, for D. K. Johnson, Newcastle-under-Lyme.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

NOTE.—The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5: "Any person who unlawfully and carnally knows . . . any girl being of or above the age of thirteen years and under the age of sixteen years . . . shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour . . ."

Sect. 20: "Every person charged with an offence under this Act or under section forty-eight and sections fifty-two to fifty-five, both inclusive, of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, or any of such sections, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury."

The Punishment of Incest Act, 1908 (8 Edw. 7, c. 45), s. 1, sub-s. 1: "Any male person who has carnal knowledge of a female person, who is to his

knowledge his . . . daughter, . . . shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour: Provided that if, on an indictment for any such offence, it is alleged in the indictment and proved that the female person is under the age of thirteen years, the same punishment may be imposed as may be imposed under section 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), which deals with the defilement of girls under thirteen years of age”

Sect. 4, sub-s. 4: “Section 4 of the Criminal Evidence Act, 1898, shall have effect as if this Act were included in the schedule to that Act.”

The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1: “Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

“(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

“(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged”

Sect. 4: “(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

“(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.”

SCHEDULE.

ENACTMENTS REFERRED TO.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83 .	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83 .	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75 .	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69 .	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41 .	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

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1911 The Prevention of Cruelty to Children Act, 1894, was repealed by s. 33,
 sub-s. 2, of the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7,
 REX c. 15).
 v. By s. 27 of the Children Act, 1908 (8 Edw. 7, c. 67), it is provided that as
 ACASTER. respects proceedings against any person for an offence under Part II. of the
 REX Act, or for any of the offences mentioned in the First Schedule to the Act,
 v. the Criminal Evidence Act, 1898, shall apply as if in the schedule to that
 LEACH. Act a reference to Part II. of the Children Act, 1908, and to the First
 Schedule to the same Act were substituted for the reference to the Prevention
 of Cruelty to Children Act, 1894.

W. H. G.

C. A.

[IN THE COURT OF APPEAL.]

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Nov. 30 ;
 Dec. 1, 19.

*Trespass — Justification — Act done in Preservation of Property — Shooting
 Rights — Extinguishing Fire — Actual Necessity — Reasonable Act.*

If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. The justification of a trespass for that purpose depends on the state of things at the moment of interference, and not upon the inference as to necessity to be drawn from the event. It is not therefore the law that the intervention of the tenant should be proved by the event to have been in fact necessary for the preservation of the property in the sense that, but for that intervention, his property would have been destroyed or injured ; it is a good defence in law if, there being a real and imminent danger, the means taken by the tenant to avert it were reasonably necessary in the sense that they were acts which in all the circumstances of the case a reasonable man would do to meet such a real danger.

The plaintiff, an owner of land, let the shooting rights over the land to one C., whose bailiff and head gamekeeper the defendant was. A fire broke out on the land, and, while men in the employ of the plaintiff were endeavouring to beat it out, the defendant set fire to strips of heather between the fire and a part of the shooting where were some nesting pheasants, the property of his master. Shortly afterwards the plaintiff's men succeeded in extinguishing the fire. The plaintiff brought an action of trespass in the county court, and the jury were asked two questions: (1.) " Was the method adopted by the defendant in fact necessary for the protection of his master's property ? " and (2.) " If not, was it reasonably necessary in the circumstances ? " They answered the first question in the negative, the second in the affirmative. The county court judge gave judgment for the defendant :—

Held, by Buckley and Kennedy L.JJ., that upon the findings of

the jury the defendant was entitled to judgment; Vaughan Williams L.J. dissenting upon the ground that the answer to the first question meant that what the defendant did was not necessary in fact for the protection or preservation of his master's property, and, that being so, the second question could not mean "was it reasonably necessary?" but must mean "did the defendant reasonably think it necessary?"

Decision of Divisional Court [1911] 2 K. B. 837, reversed.

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APPEAL of the defendant from the decision of a Divisional Court (Phillimore, Hamilton, and Scrutton JJ.) upon an appeal from the county court of Surrey holden at Aldershot, reported [1911] 2 K. B. 837.

The action was for trespass. The plaintiff, who was the owner of land, by an agreement dated February 1, 1909, let the shooting rights over the land to one Chase for a term of two years.

The defendant was bailiff and head gamekeeper to Chase.

During April and May, 1909, a number of heath fires broke out on the land of the plaintiff. On April 21, 1909, a serious fire broke out on the south side of a part of the shooting known as the Welsh Drive, where there was a covert affording shelter to nesting pheasants. There was a conflict of evidence as to the direction of the wind.

Some fifty men were engaged in beating out the fire. While they were thus occupied the defendant came along the Welsh Drive and set fire to strips or patches of heather at some considerable distance from the main fire and between it and the Welsh Drive. On being asked why he interfered he said the men did not know how to deal with a fire. Shortly afterwards the men succeeded in extinguishing the fire.

The plaintiff brought an action in the county court of Hampshire holden at Basingstoke. Judgment was given in that action for the plaintiff for nominal damages and an injunction. The defendant appealed; and the Divisional Court, being in some doubt as to whether the county court judge had directed his mind to the question whether the act of the defendant was necessary for the protection of his master's game, ordered a new trial to be had in the county court of Surrey holden at Aldershot: see the report of *Cope v. Sharpe*. (1) It was subsequently ordered

(1) [1910] 1 K. B. 168.

R

C. A. that the trial should take place before a jury: see *Rex v. Surrey*
1911 *County Court Judge*. (1)

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The second trial proved abortive as the jury could not agree upon a verdict. The case was thereupon heard for the third time. The county court judge left the following questions to the jury:—

(1.) Was the method adopted by the defendant in fact necessary for the protection of his master's property?

(2.) If not, was it reasonably necessary in the circumstances?

The jury answered the first question in the negative and the second in the affirmative. An argument ensued as to which question was as a matter of law the proper question to be left. The county court judge held that the second was the proper question. He therefore entered judgment for the defendant.

The plaintiff appealed to a Divisional Court, who entered judgment for the plaintiff. (2)

The defendant appealed.

Rawlinson, K.C., and *R. S. Nolan*, for the defendant. The answers of the jury amount to a finding that, although the fire was extinguished aliunde, what the defendant did was reasonably necessary for the protection of his master's game, and the county court judge was right in entering judgment for the defendant upon the findings. The defendant is not bound to shew a necessity in fact for the course taken by him; there was an apparent danger to his master's property, and the defendant took reasonable steps to meet it. "Reasonable necessity" is a well-known phrase in the law; it is dealt with in relation to mercantile necessity in *Carver on Carriage by Sea*, 5th ed., s. 297, where the following passage is cited from the judgment in *Australasian Steam Navigation Co. v. Morse* (3):—"The word 'necessity,' when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power—what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, where by the

(1) [1910] 2 K. B. 410.

(2) [1911] 2 K. B. 837.

(3) (1872) L. R. 4 P. C. 222, at p. 230.

force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken that it was, in a mercantile sense necessary to take it. . . . A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it." In the Divisional Court much of the argument, and many of the cases cited, turned upon the right of a third party to interfere as a volunteer in order to protect property of another which is in apparent danger. But the present case raises no question of the rights of third parties, and the authorities cited with regard to such a question have no application; here the defendant's master was the tenant to the plaintiff of the shooting rights over his land, and, as shooting tenant, he acquired certain contractual rights which he was entitled to enforce for the preservation of his game; it is altogether different from an act of interference by a third party. As shooting tenant, the defendant's master had a right to do what was reasonably necessary for the protection of his own property, and the defendant himself did no more than what was reasonably necessary in his master's interests. In deciding whether an act is "reasonably necessary" the point of time to be regarded is the moment at which the act was committed; "actual necessity" can often only be determined some time afterwards when the matter is complete. There is no authority for the suggestion that in such a case the defendant could only intervene at his own risk. The Divisional Court did not give due effect to the answer of the jury to the second question. [They also referred to *Dewey v. White* (1); *Pollock on Torts*, 8th ed., p. 392.]

Parfitt, K.C., and *R. A. Willes*, for the plaintiff. No question as to the rights arising by reason of the contractual relationship of landowner and shooting tenant was raised in the Divisional Court; the substantial point was that "reasonable necessity" was an answer to the action. In old days the doctrine of reasonableness

(1) (1827) *Moo. & M.* 56.

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C. A. as a defence to an action of trespass had no place in the law,
 1911 and it is still the law that, in order to justify a trespass on
 COPE the property of another, there must be a necessity in fact existing
 v. at the moment of the trespass. The mere bona fide opinion of
 SHARPE the individual as to the necessity for interference is clearly
 (No. 2). insufficient and affords no answer to an action: *Kirk v. Gregory* (1),
 which case also shews that (1.) there must be a necessity for
 interference, and (2.) the steps taken must be reasonable. There
 must be such imminent danger at the time that a reasonable
 man would in such circumstances consider it necessary to act in
 the way that the defendant acted. But the first answer of the
 jury negatives the suggestion that there was any imminent
 danger at the time when the defendant acted. The only implied
 right arising from the fact of the defendant's master being the
 shooting tenant was an implied authority for the tenant to do
 what was reasonably necessary for the enjoyment of his shooting
 rights, that is, for the preservation or destruction of the game.
 [They also referred to *Maleverer v. Spinke* (2) ; *Mouse's Case*. (3)]

Cur. adv. vult.

1911. Dec. 19. VAUGHAN WILLIAMS L.J. read the following judgment:—In the Divisional Court Phillimore J., according to the report in the *Law Reports* (4), after citing questions (1.) and (2.), which he cites thus—(1.) “Was the method adopted by the defendant in fact necessary for the protection of his master's property?” and (2.) “If not, was it reasonably necessary in the circumstances?”—proceeds to say: “We have now to decide which was the proper question. The first question raises no difficulty, but the second question requires some interpretation. What is the meaning of the question, whether the act of the defendant was ‘reasonably necessary’? We think it means, was the act of the defendant such an act as might in the circumstances, and did in fact, appear to him, as a reasonable man acting bona fide, to be necessary?”

The judgment of Phillimore J. seems to me to be inaccurate in

(1) (1876) 1 Ex. D. 55.

(3) (1609) 12 Rep. 63.

(2) (1538) Dyer, 35b.

(4) [1911] 2 K. B. 837, at p. 841.

so far as he states that the question for the Divisional Court on the appeal from the county court was which of the two questions (1.) and (2.) was the proper question. For it is plain from the form of the two questions put to the jury that the questions presented to them were intended to be indissoluble and connected by the words "if not" which prefaced question (2.). The county court judge does not ask the jury two independent questions, since the words "if not," mean "if you find that the method adopted by Sharpe was not in fact necessary for the protection of his master's property, I ask you the further question 'was it reasonably necessary in the circumstances?'" The learned county court judge could not have meant "was it reasonably necessary in fact?"; because, if it was reasonably necessary in fact, the answer to the first question should have been "Yes" instead of "No"; for the method adopted could not be the less necessary because it was reasonable. The second question therefore must have meant, and the jury would understand it to mean, what Phillimore J. says it means, namely, "was the act of the defendant such an act as might in the circumstances, and did in fact, appear to him, as a reasonable man acting bona fide, to be necessary?"

It follows, in my opinion, that the view of Hamilton J. is right when he says, "In my view the finding of the jury that the method adopted by the defendant was not in fact necessary is conclusive of the case." For the answer to the second question, which was not an alternative question, can only mean that the method adopted by the defendant was "such an act as might in the circumstances, and did in fact, appear to him, as a reasonable man acting bona fide, to be necessary." I cannot forbear quoting one more passage from what seems to me the cogent reasoning of Hamilton J.: "If the second finding of the jury is susceptible of a meaning consistent with the first, we ought to give it that meaning. If it means that, although there was no necessity in fact yet the defendant honestly and not without reason thought that there was, that may exculpate him from the charge of a breach of duty to his master, but it is not enough to justify him or his master in his action towards the plaintiff. If, on the other hand, it is supposed to raise the contention that where intervention

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C. A. is necessary, the choice of means must be reasonable, the contention thus raised is irrelevant, because by the finding of the jury the intervention of the defendant was not necessary."

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So far I have dealt with and approved what I understand to be the basis of the decision of the Divisional Court. I will now deal with the arguments which have been urged against that decision. First, it is said that the decision of the Divisional Court is based on the assumed principle of law that justification for a trespass can only be successfully set up in a case where the means adopted to preserve or protect property in the face of imminent danger in fact protect or preserve such property from injury. I do not find that proposition in terms in the judgment of either of the learned judges in the Divisional Court. It is suggested, however, that this proposition may be inferred from the judgment of Phillimore J. I do not so infer; he only says that it is actual, and not merely apparent, necessity for interference which must be shewn. The words to my mind connote and mean necessity arising from imminent or actual danger whether successfully averted or not by the means adopted by the defendant. Construed in this sense, the words of Phillimore J. affirm to my mind what is perfectly good law. If his words meant that necessity can only justify trespass on or destruction of the property of another when the property is in fact saved or preserved by the method adopted by the defendant, I think so construed the proposition would not be good law. It is urged that question (1.) means, "Did the method adopted by the defendant in fact protect or preserve his master's property?" I cannot so read or construe it. I think it means, "Was the method adopted by the defendant in fact necessary for the protection or preservation of his master's property?" and the answer means that the method adopted was not necessary for that purpose. It may be that the jury meant that it was not necessary because the methods adopted before the defendant came on the scene were amply sufficient to extinguish the danger, or not necessary for any other reason; but it is no duty of mine to determine what the reason of the jury was; they have found that the method adopted by the defendant was not necessary. I cannot construe this answer as meaning that the preservation of his master's

property was not in fact the result of the method adopted by the defendant; nor do I think that the jury intended this answer to be so understood. The time for judging of the necessity obviously was the moment when the defendant determined to adopt, or did adopt, his method, and I think that the question and answer mean—the question,—Was the act done by the defendant necessary when the defendant so set fire to the heather?—and the answer is, No, it was not.

It is true that the decision of this case depends on the construction of questions put to the jury and the answers given by them. I think that the questions and answers should be construed as I have construed them; at all events, the jury may have understood the questions and intended the answers in the sense that I have denoted; in a sense that I think the natural sense, and which is the sense in which Phillimore J. and Hamilton J. have, as I read their judgments, understood those questions and answers.

In my opinion this appeal should be dismissed with costs. Having regard to the history of this case and the evidence, I see no sufficient reason for a new trial in the fact that either the questions or answers are capable of two different constructions.

BUCKLEY L.J. read the following judgment:—The plaintiff was lessor to Mr. Chase of the sporting and shooting rights over the ground. The defendant was Mr. Chase's keeper. The shooting tenant had property and rights which might have been injuriously affected by the fire. He had sitting pheasants in the cover, and the birds and their eggs and nests might have been destroyed, and he had an interest in the cover as a cover for sporting purposes. Under these circumstances the defendant did certain acts for the protection of his master's property, and the jury were asked two questions with reference to those acts. Their answer to the first question was that the defendant's acts were not in fact necessary for the protection of the property. In my opinion this answer means that the fire was in the event extinguished without the aid of the impediment which the defendant had created. In other words, that, if he had not done that which he did, his master's property would nevertheless not

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have been injured. Having negatived that the acts were in fact necessary, the jury then affirmed that the acts were reasonably necessary in the circumstances. In so doing, in my judgment they affirmed two things. By the word "necessary" they affirmed that there was a real and imminent danger against which it was necessary to provide, and by the word "reasonably" they affirmed that the acts which the defendant did were acts reasonably done to meet that real and imminent danger. They qualified the word "necessary" in each of two cases. They found that the defendant's acts were not in fact (i.e., in the result), but were in reason, necessary. I decline to go back upon the evidence. The jury have in my opinion by their findings affirmed the propositions which I have stated.

In this state of facts the question is whether, as matter of law, the defendant has justified that which in the absence of sufficient justification would be a trespass. I notice that Hamilton J. says that in his view the finding of the jury that the method adopted by the defendant was not in fact necessary is conclusive of the case. I do not agree. The test is not whether, if the defendant had not done those acts, the danger would in fact have resulted in injury. Neither is it whether the defendant believed that it would have resulted in injury. The test, I think, is whether, having regard to the rights of the sporting lessee, there was such real and imminent danger to his property as that he was entitled to act and whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger.

I find that Phillimore J. says that the authorities appear to be all one way, meaning by that expression that they all tend to shew that the defendant cannot justify by anything short of actual necessity. I do not agree. In *Dewey v. White* (1) the plea which was held to be good was a plea that there was great and immediate danger and that to avert it the defendant unavoidably damaged the plaintiff's house. The defendant there was a stranger in the sense that he was not defending rights and interests which he had contractually as between himself and the plaintiff, but even in that case a plea of great and

(1) Moo. & M. 56.

imminent danger was held to justify an act which unavoidably damaged the plaintiff's property. It is true that in that case the danger was not to private property, but to His Majesty's subjects, and that the instances put in *Maleverer v. Spinke* (1) were similar in that respect. But the case is, I think, stronger and not weaker where, as between plaintiff and defendant, there exist contractual rights. The maritime cases are, I think, authorities not for the plaintiff but for the defendant. In *Mouse's Case* (2) there is no decision that if the storm had abated so that the jettison turned out to be in fact not necessary the decision would have been otherwise. *Carter v. Thomas* (3), in which the judgment of Kennedy J. was relied upon, was again the case of a stranger, and might have been applicable here if the fact had been, as it was not, that a mere stranger to this moorland property had taken upon himself to go and use amateur means for stopping what he anticipated might be a fire which would extend very widely. The words "reasonably necessary" in the question left to the jury may have been taken from, and at any rate, I think, are justified by, *Kirk v. Gregory* (4), and by the language of Brett L.J. in *Whitecross Wire Co. v. Savill* (5), where he speaks in a maritime case of the existence of a danger such as to make the sacrifice reasonable.

In my opinion the defendant is here entitled to judgment upon the ground that the jury have found that "in the circumstances," involving, as does that expression, (1.) the existence of the sporting lease, (2.) the rights and interests of the lessee in the property which was in danger, (3.) the proximity of the fire, and (4.) the condition of the herbage, the method adopted by the defendant for the protection of his master's property was necessary to meet the threatened danger and was reasonably used. In my judgment this is a good defence in law. Upon this ground I think that the defendant is entitled to succeed. The point as regards the relationship of lessor and lessee was no new one in this case; it had been pointed out by Darling J. in his judgment as a salient fact in *Cope v. Sharpe*. (6)

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(1) Dyer, 35b.

(2) 12 Rep. 63.

(3) [1893] 1 Q. B. 673.

(4) 1 Ex. D. 55.

(5) (1882) 8 Q. B. D. 653, at p. 662.

(6) [1910] 1 K. B. 168, at p. 171.

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1911 entered for the defendant with the costs of the action and of this
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KENNEDY L.J. read the following judgment:—I have come to the conclusion that this appeal ought to be allowed and the judgment of the learned judge of the county court restored.

With parts of the judgments pronounced in the Divisional Court I agree. I agree in holding that an interference with the property or the person of another, which otherwise would certainly constitute an actionable trespass, cannot be justified by mere proof on the part of the alleged trespasser of his good intention and of his belief in the existence of a danger which he sought by his act of interference to avert, but which in fact did not exist at all. The case cited by Phillimore J. from the Year Book, Hil. 22 Edw. 4, f. 45, pl. 9, 10, as to the imprisonment of a supposed lunatic supports and illustrates this view. The person imprisoned was not in fact a lunatic; therefore there was not any basis of danger to justify his imprisonment. There are, however, two points upon which I respectfully differ from the Divisional Court in the present case. The first of these is that the learned judges in that Court have decided against the defendant upon the ground that, according to the first of the two findings of the jury, he has failed to prove that his interference with the plaintiff's property—the patches of heather which the defendant burned—was actually necessary in order to save the covert in which were the nesting pheasants from being involved in the conflagration. They have held that the second finding of the jury that the course which the defendant pursued in order to save the nesting pheasants was “reasonably necessary” afforded no defence. The principle of such a decision, as it appears to me, can only be that, although at the moment of the interference of an alleged trespasser with the property of another the danger to life or property which it was sought to avert by that interference was a real and existent danger, and a danger so imminent that any reasonable man would in the circumstances treat it as one in which it was necessary, in order to save life or property endangered, to interfere as the alleged trespasser has done, he

must be held, nevertheless, guilty of a trespass, unless he can also prove that, but for that interference, the person or the property which he sought to protect *must*—for nothing less than this is the meaning of the expression “actually necessary”—have suffered harm or loss.

I do not think that this is the law. The justification of such interference depends, in my judgment, upon the state of things at the moment at which the interference takes place, and not upon the inference as to necessity to be drawn from the event. A house is on fire ; the fire, as the wind is blowing, creates an imminent danger for the occupant of the adjoining premises, and he, to avert that danger, pours water into the burning house. Let us suppose that the wind suddenly changes, or that unforeseen assistance arrives, so that in the event it is plain that the discharge of water into the burning house was not actually necessary for the preservation of the adjoining premises ; can it rightly be contended that if, upon the trial of an action brought by the owner of the burning house to recover compensation for property which was damaged by the water, it was proved to the satisfaction of the jury that the commission of the act complained of was, at the time when such damage was done, “reasonably necessary” (in the words of the second finding of the jury in the present case) in order to save life or property in the premises then endangered by their proximity to the conflagration, the plaintiff would nevertheless succeed, because it was proved by him at the trial that, by reason of the subsequent change of wind or by reason of the arrival of unforeseen assistance, his neighbour’s precaution was, in the event, *actually unnecessary* ?

Or, take the case of the jettison of cargo at sea. Could it properly be contended that the legal justification of the jettison depends upon proof that in fact, as things have happened, it was *actually* necessary for the safety of the adventure, and that a jettison made reasonably in order to preserve the adventure from imminent peril of destruction in a gale must be held to be unjustifiable, if the owner of the goods jettisoned can prove that, after the jettison took place, a sudden fall of the wind or a sudden change in its direction removed the peril and that, therefore,

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the adventure would in fact have been preserved without the jettison? In my humble judgment, this question ought to be answered in the negative; and, if authority is sought upon the point, I think it sufficiently appears in the judgment of Brett L.J. in *Whitecross Wire Co. v. Savill* (1), and in the statement in 2 Phillips on Insurance, 3rd ed., ch. 15, s. 1, par. 1270 (cited in the argument of the last mentioned case), that, "in order to constitute a basis for a contribution for an expense or sacrifice";—or, in other words, in order to justify the destruction or damage of property at sea for the safety of the adventure, "it must be occasioned by an *apparently imminent peril*." I do not think that either *Mouse's Case* (2), or *Maleverer v. Spinke* (3), or *Dewey v. White* (4), cited by Phillimore J., furnish any authority for an opposite view. On the contrary, it appears to me that the judgment of Best C.J. in *Dewey v. White* (4), in comparing the justification of the damage caused by pulling down a dangerous structure with the justification in the case of maritime jettison, tends to support the contention of the appellant. These cases do shew that the law requires, in order to make good a defence in an action of trespass for interference with the property of another for the purpose of averting an imminent danger, that the defendant shall prove that such a danger existed actually, and not merely in the belief of the defendant. They do not shew that, even if the existence of such an imminent danger as to vindicate the reasonableness of the interference in order to preserve property exposed to the danger is proved, the defence must still fail unless it is also proved that the interference was, in the circumstances as they eventually happened, actually necessary, that is to say, that the property sought to be preserved must, but for the interference complained of, have suffered injury or destruction. Nor is there anything in my own judgment in *Carter v. Thomas* (5), to which I refer only because it is mentioned by Phillimore J., that conflicts with the views which I have just expressed. What I was there at pains to point out was that

(1) 8 Q. B. D. 653.

(2) 12 Rep. 63.

(3) Dyer, 35b.

(4) Moo. & M. 56.

(5) [1893] 1 Q. B. 673.

in the case of a mere volunteer it would require very special circumstances to justify, on the ground of reasonable necessity, his forcible entry into the premises of another against the will of the owner, in order to help in extinguishing a fire. In the present case the defendant was not a mere volunteer, and therefore no such question arises for consideration. He was the gamekeeper in the service of Mr. Chase, to whom the plaintiff, the landowner, had let the sporting rights over his estate, including the land on which the fire occurred and on which were the heather patches fired by the defendant and the covert sheltering the nesting birds which the defendant sought to protect from the fire by destroying some patches of the heather in advance of the flames. The defendant's fulfilment of a duty to his master, as Hamilton J. points out, could not affect any right of the plaintiff, but, at the same time, in acting for his master, the defendant was, as against the plaintiff, entitled to stand in the same position as his master as lessee of the sporting rights who had, as tenant, the right to maintain the game by all means which did not involve unreasonable interference with, or damage to, the property of the lessor. Reasonableness—the term which our law in so many cases treats as the test of legality in questions of human conduct—of course includes, when you are considering the legality of the destruction of another's property, the comparison (*inter alia*) of the value of that which is destroyed or damaged in order to preserve it. Here, as the judgment pronounced by Phillimore J. shews, the damage resulting from the defendant's act was not more than nominal. It appears to me that, in considering the reasonableness of the defendant's conduct in the present case, the jury were warranted in including in the circumstances to which they expressly refer in their second finding the fact that the defendant was not a mere volunteer but, as representing his employer, the plaintiff's tenant, invested, as against the plaintiff as well as others, with the right to preserve the sitting pheasants from being burned by reasonable methods.

I have so far been dealing with the view of the Divisional Court that a defence of "actual necessity" must be proved in order to establish an answer to the plaintiff's case in this action. But I am further obliged to differ from them in the construction

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which they appear to have placed upon the second finding of the jury. By that finding the jury in express terms decided that "the method adopted by the defendant for the protection of his master's property was reasonably necessary in the circumstances." The learned judges in the Divisional Court, if I correctly understand their judgments, have construed this finding to mean only that the defendant reasonably believed that a danger to his master's property existed requiring his interference, but that in fact no such danger existed. I must confess myself unable so to interpret it. I do not think this is the fair or natural meaning of the words. The jury, in my view, have not found that the method adopted by the defendant was unnecessary. They have found that it was in fact not necessary; they have found that it was necessary in reason. They have not in either of their findings negatived the existence of an imminent danger. Read, as it ought to be, in contrast with the first finding that no "actual necessity" existed, the second finding, that a "reasonable necessity" for the defendant's action did exist, *must*, I think, mean that there was, at the time when the defendant acted, a danger to the property of the defendant's master, so far imminent that any reasonable person in the circumstances of the defendant would act reasonably in treating it as necessary to adopt the method for the preservation of the property in jeopardy which the defendant adopted. So interpreted, this finding in my opinion gives the defendant, as it was held by the learned county court judge who tried the case, a good defence, and this opinion appears to me to be in accord with the statement of the law by Bramwell B. in *Kirk v. Gregory* (1), from which the other members of the Court (Amphlett B. and Cleasby B.) in no way dissented. I think that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Johnson, Weatherall & Sturt, for Lamb Brookes & Co., Odiham.*

Solicitors for defendant: *Walker & Rowe, for Edwyn T. Close, Camberley.*

(1) 1 Ex. D. 55.

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Metropolis—Building—Means of Escape in Case of Fire—Approval of Plans subject to Condition—Building completed without Compliance with Condition—Refusal of Certificate of Compliance—Appeal to Tribunal of Appeal—Jurisdiction to inquire into Reasonableness of Condition—London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 7, 22.

By s. 7, sub-s. 1, of the London Building Acts Amendment Act, 1905, every new building within the section shall be provided, in accordance with plans approved by the county council or (in the event of an appeal) the tribunal of appeal, with all such means of escape therefrom in case of fire as can be reasonably required, and the owner of the building shall deposit with the council plans thereof shewing the means of escape proposed to be provided; and the council may refuse to approve such plans or may approve them subject to conditions. By sub-s. 2, no such building shall be occupied until the council shall have issued a certificate or (in the event of an appeal) the tribunal of appeal shall have determined that such building has been provided with means of escape in accordance with plans approved as aforesaid by the council or the tribunal of appeal (as the case may be), and that the conditions (if any) subject to which such plans were approved have been complied with.

By s. 22, sub-s. 1, "At any time within two months after (a) the refusal or conditional grant by the council of their approval of any plans deposited pursuant to" s. 7, "or the refusal by the council to issue a certificate pursuant to the same section . . . the owner of the building . . . may if he think fit appeal to the tribunal of appeal."

The plans of a new building within the provisions of s. 7 were approved by the county council subject to a condition, and the owner of the building did not appeal within two months after the conditional approval. The owner erected the building without complying with the condition, and the council refused to issue a certificate under s. 7, sub-s. 2. The owner within two months therefrom appealed to the tribunal of appeal against the refusal of the certificate, and contended that he was entitled to raise the question whether the condition was one which could be reasonably required:—

Held, that an appeal against the condition ought to have been brought within two months after the conditional approval of the plans by the council, and that upon the appeal against the refusal of the certificate the tribunal of appeal had jurisdiction only to determine the question whether the building had in fact been erected in accordance with the plans as approved.

CASE stated by the tribunal of appeal under s. 182 of the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.). (1)

(1) This section is, among others, Acts (Amendment) Act, 1905, by incorporated in the London Building s. 27 of the latter Act.

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The respondent, Mrs. Clark, by her architect, gave notice under s. 7 of the London Building Acts (Amendment) Act, 1905, of her intention to erect an hotel, which was a "new building" within the provisions of that section (1), and on April 17, 1907, her architect deposited with the appellants, the London County

(1) 5 Edw. 7, c. ccix., s. 7:

"(1.) Every new building (except a dwelling-house occupied as such by not more than one family) which is—

"(a) A high building; or

"(b) A building in which sleeping accommodation is provided for more than twenty persons, or which is occupied or constructed or adapted to be occupied by more than twenty persons, or in which more than twenty persons are employed, or which is constructed or adapted for the employment therein of more than twenty persons;

shall be provided in accordance with plans approved by the council"—the London County Council—"or (in the event of an appeal) the tribunal of appeal with all such means of escape therefrom in case of fire as can be reasonably required under the circumstances of the case. The owner of the building shall before or at the same time that the building notice under section 145" of the London Building Act, 1894, "in respect of such building is served on the district surveyor deposit or cause to be deposited at the county hall a notice stating the like matters and particulars as are required by the last-mentioned section to be stated in a building notice thereunder together with a copy . . . of the plans prepared for such new building shewing, so far as may be necessary for the purposes of this

Act, the means of escape proposed to be provided in connection with such building.

"It shall be lawful for the council at any time within the period of one month," or in certain events within the period of two months, "after the deposit as aforesaid of such plans to refuse to approve such plans or to approve the same subject to such conditions (if any) as they may prescribe, provided that the council shall within such period as aforesaid give notice to the applicant of such refusal or conditional approval stating fully all their reasons for such refusal or for the imposition of such conditions, as the case may be"

"(2.) No upper storey in any high building not being of the class referred to in paragraph (b) of subsection (1.) of this section, and no part of any building of the class referred to in the said paragraph shall be occupied or let for occupation until the council shall have issued a certificate or (in the event of an appeal) the tribunal of appeal shall have determined that such building has been provided with means of escape in accordance with plans approved as aforesaid by the council or the tribunal of appeal (as the case may be), and that the conditions (if any) subject to which such plans were so approved have been complied with; provided that unless the council shall within fourteen days after notice of completion of any such building notify to the owner that such

Council (hereinafter called the council), under sub-s. 1 of that section, plans of the eastern block of the hotel, shewing the means of escape therefrom in case of fire proposed to be provided in connection with such building. On May 16, 1907, notice of approval of the plans was given by the superintending architect on behalf of the council subject to thirty-six conditions, the only material one being "that the staircases be separated from the rooms and corridors on all floors by fire-resisting partitions or walls, and all openings in such separations be hung with self-closing fire-resisting doors or windows glazed with fire-resisting glazing."

On October 29, 1908, the respondent's architect deposited with the council plans of the western block of the hotel shewing the means of escape therefrom in case of fire proposed to be provided in connection with such building. On November 19, 1908, notice of approval of the plans was given by the superintending architect on behalf of the council subject to certain conditions, the only material one raising substantially the same practical question as the condition given above.

On November 24, 1908, the respondent's architect wrote to the council's superintending architect stating his objection to the condition (to which he had already objected in the course of correspondence relating to the eastern block) and that he intended to appeal against it and wished to reserve his principal's right of appeal to the tribunal of appeal if it should be necessary. No appeal was in fact brought against the conditional approval above mentioned in respect of either the eastern or the western block until after the refusal of the certificate hereinafter mentioned.

certificate is refused and the grounds of such refusal such certificate shall be deemed to have been duly issued."

Sect. 22: "(1.) At any time within two months after—

"(a) The refusal or conditional grant by the council of their approval of any plans deposited pursuant to" s. 7 of the Act "or the refusal by the council to issue a

certificate pursuant to the same section

the owner of the building to which such requirement or refusal or conditional grant relates may if he think fit appeal to the tribunal of appeal."

The tribunal of appeal was constituted under s. 175 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.). And s. 182 gave power to state a case for the opinion of the High Court.

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The building of the hotel was proceeded with and ultimately completed without the above-mentioned condition relating to the eastern or the western block being complied with. The other conditions were either accepted and carried out or were modified by the council during the progress of the work and carried out in their modified form, or were dispensed with by the consent of the council. On January 20, 1910, the respondent's architect wrote a letter to the council's superintending architect informing him that the building was practically finished and asking him to have it inspected, at the same time stating his reasons for non-compliance with the above-mentioned condition; and after the completion of the building he applied to the council for a certificate under s. 7, sub-s. 2, of the London Building Acts (Amendment) Act, 1905. On February 3, 1910, the superintending architect by letter refused the certificate upon the ground that the condition had not been complied with, and in a further letter of March 3 he stated that the council declined to waive compliance with the condition, and he set forth the outstanding requirements which were insisted on.

On March 31, 1910, the respondent gave notice of appeal, under s. 22, sub-s. 1, of the Act of 1905, to the tribunal of appeal against the refusal by the council to issue the certificate, the ground of appeal being that the condition was not one which could be reasonably required under the circumstances of the case.

The appeal came on for hearing on May 31, 1910, when it was agreed that, with the exception of the provision of fire-resisting doors separating the staircases from the rooms and corridors on the upper floors in accordance with the above-mentioned condition, all other requirements either had been, or the respondent's architect had undertaken that they should be, carried out, and they in fact were subsequently carried out to the satisfaction of the council. Before any evidence was heard a preliminary objection was taken on behalf of the council that, inasmuch as no appeal had been brought by the respondent against either of the conditional approvals of the plans by the council within two months therefrom, the time for appealing against the condition or conditional approval had passed, and that, the appeal being

against the refusal by the council to issue a certificate, the tribunal of appeal were confined to considering whether the building had been provided with means of escape in accordance with the plans approved by the council, and whether the conditions subject to which such plans were so approved had been complied with, and that the tribunal of appeal had no jurisdiction to hear any appeal or any evidence against the reasonableness of the condition or conditional approvals or to approve any plans.

The tribunal of appeal held that in the circumstances on the hearing of the appeal against the refusal of the council to issue a certificate their jurisdiction under ss. 7 and 22 of the Act of 1905 was not limited in the manner contended for by the council, but that they were entitled and bound to hear and consider any evidence tending to shew that the building had in fact been provided with all such means of escape therefrom in case of fire as could be reasonably required under the circumstances of the case in accordance with plans approved by them. (1) They accordingly admitted the evidence, and came to the conclusion that the fire-resisting doors required by the above-mentioned condition could not reasonably be required under the circumstances of the case; and they allowed an adjournment to enable the respondent to prepare a fresh set of plans shewing the building as it had actually been erected. At the adjourned hearing plans were produced shewing the building as it had actually been erected. Objection was taken on behalf of the council to the plans being put in evidence and approved by the tribunal of appeal upon the ground, so far as material, that the plans had never been deposited with the council. The tribunal of appeal overruled the objection and approved the plans, and they determined that the building had been provided with all such means of escape therefrom in

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(1) In stating the reasons for their decision upon this point the chairman of the tribunal of appeal said in effect that s. 22 of the London Building Acts (Amendment) Act, 1905, drew no distinction between an appeal against the conditional approval of the plans and an appeal against the refusal of the certificate. It said

that within two months after the happening of either of the two events mentioned in sub-s. 1 (a) the owner of the building might appeal to the tribunal of appeal. He might appeal generally, and his appeal was not limited as contended for by the council.

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case of fire as could be reasonably required under the circumstances of the case in accordance with the plans approved by them.

The questions for the opinion of the Court were :

(a) Whether in the circumstances aforesaid the tribunal of appeal on the hearing of the said appeal only had jurisdiction to hear and determine and admit evidence upon the questions whether the said building had in fact been erected in accordance with the said plans approved by the London County Council subject to such conditions as aforesaid, and whether the said conditions had been complied with ; or whether the tribunal had jurisdiction to hear and determine and admit evidence upon the question whether the said building had in fact been provided in accordance with plans approved by the tribunal of appeal with all such means of escape therefrom in case of fire as could be reasonably required under the circumstances of the case.

(b) Whether in the circumstances aforesaid the tribunal of appeal had jurisdiction to admit in evidence and approve the fresh plans.

Danckwerts, K.C. (Cecil Walsh with him), for the appellants. Under s. 7, sub-s. 1, of the London Building Acts (Amendment) Act, 1905, in the case of every new building to which that section applies the owner of the building must deposit with the London County Council plans thereof shewing the means of escape in case of fire proposed to be provided, and the council may refuse to approve the plans or approve them subject to conditions. By s. 22, sub-s. 1 (a), the owner of the building may within two months after such refusal or conditional approval appeal to the tribunal of appeal against the refusal or conditional approval. The building owner must then erect the building in accordance with the plans approved either by the council or by the tribunal of appeal if there has been an appeal within the two months, and upon completion of the building the certificate of the council that the building has been provided with the means of escape in case of fire in accordance with the plans so approved is by s. 7, sub-s. 2 necessary before the building, such as the one in the present case, can be occupied or let for occupation. If the council refuse to issue

the certificate, s. 22, sub-s. 1 (a), allows an appeal to the tribunal of appeal against such refusal within two months therefrom. Upon that appeal the only question which the tribunal of appeal can hear and determine is whether the building has been provided with the means of escape in case of fire in accordance with the plans as approved; and they have no jurisdiction to entertain the question whether the conditions imposed were or were not reasonable. The Court cannot extend the time for appealing limited by the Act. If the whole matter were open upon the appeal against the refusal of the certificate the building owner might ignore the refusal of the council to approve the plans or the conditions imposed by them and proceed with the erection of the building, and, having completed it, might then ask the tribunal of appeal, upon the appeal against the refusal of the certificate, to consider the question of the refusal to approve or the conditional approval of the plans from the point of view of a completed building. Such a construction of s. 22 would be contrary to the whole scheme of the Act. The scheme of the Act is that the building shall be constructed in accordance with the plans approved by the council or by the tribunal of appeal, and by ss. 16 and 17 the execution of the work is to be subject to the supervision of the district surveyor, who must see that the conditions, if any, are complied with. The decision of the tribunal of appeal is therefore wrong. [Rules 2 and 3 of the regulations as to the procedure in cases of appeal, made under s. 184 of the London Building Act, 1894 (1), as to the time for lodging appeals, were referred to.]

C. A. Russell, K.C. (A. H. Bodkin with him), for the respondent. The object of s. 7 is that stated at the beginning of the section, namely, that every new building coming within that section shall be provided in accordance with plans approved by the council or (in the event of an appeal) the tribunal of appeal, with all such means of escape therefrom in case of fire as can be reasonably required under the circumstances of the case. The rest of the section is merely the machinery for carrying that object into

(1) This section is, by s. 27 of the London Building Acts (Amendment) Act, 1905, incorporated in that Act, and the regulations made thereunder are made applicable to appeals under that Act.

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effect. By s. 22 the building owner may select one of two occasions for bringing that matter before the tribunal of appeal. Where the plans have been approved subject to conditions he may elect to appeal at once against the conditional approval, and if so he must appeal within two months after the conditional approval. But he may postpone his appeal against the conditional approval until the certificate of compliance has been refused, and upon that appeal the tribunal of appeal may consider whether the conditions imposed are reasonable. He may, either within two months after the conditional approval or within two months after the refusal to issue a certificate, by an appeal to the tribunal of appeal bring before that tribunal the question whether the building has been provided with all such means of escape in case of fire as can be reasonably required under the circumstances of the case. In the latter case the tribunal of appeal do not order the county council to issue a certificate of compliance; they determine the matter themselves. That is the reasonable construction of s. 22, which is perfectly general in its terms. During the execution of the work it may be found that some of the conditions imposed by the county council are unnecessary, as in the present case, and the ultimate difference between the building owner and the council may be reduced to one or two conditions. Instead of incurring the expense of contesting in the first instance by an appeal against the conditional approval of the plans, all the conditions originally imposed, it is a saving of expense to have the dispute limited to those conditions alone which are found during the progress of the work to be material, and therefore s. 22 upon its true construction allows that dispute to be postponed until the appeal against the refusal of the certificate. Upon that appeal he may deposit plans of the building for approval by the tribunal of appeal, the provision in s. 7 as to the time for depositing the plans being directory only : *London County Council v. Spink & Son*. (1) If the contention of the appellants is correct, an appeal to the tribunal of appeal from the refusal of the certificate can only raise a formal question, namely, whether the building has been provided with the means of escape in case of fire in

(1) [1908] 2 K. B. 447.

accordance with the plans and conditions approved by the council. The construction placed upon s. 22 by the tribunal of appeal is therefore right.

Danckwerts, K.C., in reply.

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HAMILTON J. This is a case stated by the tribunal of appeal constituted under s. 175 of the London Building Act, 1894. In 1907 the respondent's architect prepared plans for the erection of an hotel in Berners Street, which was a "new building" coming within the provisions of s. 7 of the London Building Acts (Amendment) Act, 1905. Plans of the eastern block of the hotel, shewing the means of escape therefrom in case of fire proposed to be provided, were deposited with the London County Council, the present appellants, pursuant to that section, for the purpose of receiving their approval. The county council approved of the plans subject to a large number of conditions, and a somewhat similar course was adopted with regard to the plans of the western block of the hotel which were deposited with the council later. Eventually the conditions imposed were either complied with or modified or withdrawn with the exception of one which required the staircases to be separated from the rooms and corridors on all floors by fire-resisting partitions or walls, and all openings in such separations to be hung with self-closing fire-resisting doors or windows glazed with fire-resisting glazing. Upon that requirement there might well be a difference of opinion among those who are conversant with the subject as to whether a particular structure complied with the requirement, whether a particular material could be described as fire-resisting, or whether a particular opening was closed by a door which could be called self-closing. Though the respondent's architect intimated in his letter to the council that he might appeal against the imposition of the condition, no appeal was in fact brought to the tribunal of appeal within two months therefrom. The erection of the hotel proceeded, and the time arrived at which it was necessary, as a condition precedent to the occupation of the building, to apply to the council, under s. 7, sub-s. 2, of the Act of 1905, for a certificate that the building had been provided with means of escape in case of fire in accordance with the plans as conditionally

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approved. The council by their superintending architect necessarily refused to issue such a certificate inasmuch as the respondent had not complied with the condition above mentioned. Thereupon on March 31, 1910, within two months after the refusal to issue the certificate, but considerably more than two months after the plans had been conditionally approved by the council, the respondent gave notice of appeal against the refusal to issue the certificate upon the ground that the condition was not one which could be reasonably required under the circumstances of the case. When the case came before the tribunal of appeal a preliminary objection was taken that the tribunal of appeal had no jurisdiction upon that appeal to hear evidence upon or to consider the reasonableness of the condition. The respondent contended that she was entitled upon that appeal to call evidence as to the reasonableness of the condition, just as if the appeal had been brought against the conditional approval of the plans within two months thereof. The tribunal of appeal allowed this evidence to be given, and came to the conclusion that the condition was not one which could be reasonably required. Inasmuch as s. 7, sub-s. 1, of the Act provides that the building must be provided with means of escape in accordance with plans approved by the council or, in the event of an appeal, by the tribunal of appeal, and as there were no plans of the building as erected in existence, the tribunal of appeal allowed the respondent's architect to prepare such plans and to produce them in evidence, though it was objected that the tribunal could not approve plans which had never been before the county council, and thereupon the tribunal made an order approving the plans and determining that the building had been provided with all reasonable means of escape in case of fire. The questions which we have been asked are whether the tribunal of appeal had jurisdiction to determine that matter, or whether their jurisdiction was limited to determining whether the building had in fact been erected in accordance with the plans as approved, subject to the conditions, by the county council; and whether the tribunal had jurisdiction to admit in evidence and approve the new plans which they allowed the respondent's architect to prepare.

Sect. 22, sub-s. 1, of the Act of 1905, which gives the right of appeal, provides that "at any time within two months after" certain events set out in clauses (a) to (e) "the owner of the building to which such requirement or refusal or conditional grant relates may if he think fit appeal to the tribunal of appeal." Clause (a) is that which is material in this case: "The refusal or conditional grant by the council of their approval of any plans deposited pursuant to" s. 7 of the Act, "or the refusal by the council to issue a certificate pursuant to the same section." In the first place it is to be observed that that clause specifies two separate events each of which refers to a distinct function of the county council and each of which might, as a matter of drafting, have been placed in a separate clause. In the next place the scheme of the legislation is that the executive authority is the county council, and the tribunal of appeal is a judicial and appellate tribunal, and the duty of examining the plans and of giving or refusing approval thereto is placed in the first instance upon the council without any co-ordinate power of resort to the tribunal of appeal for its approval. Lastly, it is obvious that the two events specified in s. 22, sub-s. 1 (a), are likely, and in the case of a large building such as this are certain, to be separated by a long interval of time, and yet if the decision of the tribunal of appeal were correct the owner of the building might erect it in defiance of the conditions attached by the council to their approval of the plans, and then having produced a *fait accompli* might, upon an appeal against the inevitable refusal by the council to issue a certificate of compliance under s. 7, sub-s. 2, ask the tribunal not to alter the *fait accompli*, but by the exercise of a discretion, which would be an original and executive and not an appellate discretion, to go into the question of the reasonableness of the conditions imposed by the council, and to approve the plans upon which the building had been erected in place of the plans as originally approved. I do not think that that is in accordance with the language of the section, or with the scheme of the Act, which provides for the supervision of the work by the district surveyor as the erection of the building progresses. The natural construction of s. 22, sub-s. 1 (a), is to read it distributively. Instead of stating each event in a separate clause, the

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sub-section places the two events together in one clause, and then gives an appeal in respect of each event within two months after the happening of that event. If the intention were to give the building owner two separate opportunities of having the plans, which are in their nature preliminary to the commencement of the building, examined and approved, each within two months after the happening of a specified event, and each separated by a considerable interval of time, with a right upon the second occasion to discuss all the matters which could have been discussed on the first occasion, the section would have been framed differently. Reading the sub-section distributively, the building owner "may if he think fit appeal to the tribunal of appeal" against the specific event which causes him the grievance within two months after the happening of that event. The notice of appeal in this case rightly followed that view, the appeal being stated to be against the refusal of the certificate of compliance. That appeal was in time. It was then too late to appeal against the conditional approval of the plans, and it was not competent for the tribunal of appeal to allow the appeal to be so transformed.

The answer therefore to the first part of question (a) is in the affirmative, and to the second part in the negative, that is to say, that the tribunal of appeal on the hearing of the said appeal only had jurisdiction to hear and determine and admit evidence upon the questions whether the said building had in fact been erected in accordance with the said plans approved by the London County Council subject to such conditions as aforesaid and whether the said conditions had been complied with; and had no jurisdiction to hear and determine and admit evidence upon the question whether the said building had in fact been provided in accordance with plans approved by the tribunal of appeal with all such means of escape therefrom in case of fire as could be reasonably required under the circumstances of the case. With regard to question (b), it follows that the tribunal of appeal had no jurisdiction to allow the building owner's architect to produce fresh plans of the building as erected, as if they had been the original plans, and to approve those plans, and then to issue their certificate that the building had been erected in accordance

with the plans so approved. The answer to that question will therefore be in the negative.

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BANKES J. I am of the same opinion. Sect. 7 of the London Building Acts (Amendment) Act, 1905, applies to new buildings of a certain class, and its object is to provide that as to such new buildings there shall be provided sufficient means of escape therefrom in case of fire. The scheme of the Act is that the London County Council shall in the first instance be the judges of the sufficiency of the means of escape proposed to be provided, with an appeal from their decision to the tribunal of appeal. In order to secure that object s. 7, sub-s. 1, provides that the building owner shall, before or at the same time that the building notice required by s. 145 of the London Building Act, 1894, in respect of such building is served on the district surveyor, deposit a like notice with the county council together with the plans of the building shewing the means of escape proposed to be provided in connection therewith. The section thus indicates the time when the plans shall be deposited with the council, and in *London County Council v. Spink & Son* (1) it was decided that the provision as to the time for the deposit of the plans is directory only and not a condition precedent to the jurisdiction of the county council to approve or reject the plans or to the right of the building owner to appeal under s. 22 to the tribunal of appeal. It is clear, however, that the building owner has at some time to deposit plans with the council for their approval. It is the duty of the council to consider those plans, and they may approve or refuse to approve them or approve them subject to conditions. From the decision of the council refusing to approve or conditionally approving the plans the building owner has a right of appeal under s. 22, sub-s. 1, of the Act within two months therefrom. The intention of the Act is that, upon that appeal, the tribunal of appeal shall consider the question of the sufficiency of the means of escape in case of fire provided by the plans, before any considerable expense in connection with the actual erection of the building has been incurred, and that at that time, and not when the building has

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been completed and the whole expense of the work has been incurred, the tribunal of appeal shall consider whether or not they agree with the council upon that question. The considerations which apply to a building already erected may well differ in many respects from those which apply in the case of a building which has not been begun. Sect. 7 provides an additional precaution that the building shall, when erected, be provided with sufficient means of escape in case of fire, because by sub-s. 2 the certificate of the county council, or (in the event of an appeal) the determination by the tribunal of appeal, that the building has been provided with the means of escape in accordance with the plans as approved, is a condition precedent to the building being occupied or let for occupation. If the county council refuse to issue a certificate, s. 22, sub-s. 1, again gives the building owner a right of appeal within two months therefrom to the tribunal of appeal. That appeal, however, is limited to the question whether the building as erected has been provided with the means of escape in accordance with the plans approved by the county council or the tribunal of appeal, as the case may be.

We are asked to say that, upon an appeal as to whether the building has been provided with means of escape in accordance with the plans as conditionally approved by the council (there having been no appeal against the conditional approval of the plans), the tribunal of appeal are entitled to allow the building owner to produce plans of the building as actually erected, which plans were not those conditionally approved by the council, and to approve those plans, and upon them to exercise their jurisdiction under s. 7, sub-s. 2, and to determine that the building has been provided with the means of escape in case of fire in accordance with the plans so approved by them. It is only possible to assume that jurisdiction by adopting the reading of s. 22 which the tribunal of appeal adopted. To my mind that is not the correct reading of the section. It is opposed to the whole scheme of the Act, and would enable the tribunal of appeal to exercise their jurisdiction as to approval of the plans at a time other than that contemplated by the Act, the proper time being upon an appeal within two months after the county council has refused to approve or has conditionally approved the plans submitted to them. Upon

that ground I think that the decision of the tribunal of appeal was wrong, and that they assumed a jurisdiction which the Act has not conferred upon them. Upon an appeal to them against the refusal by the county council to issue a certificate their jurisdiction is confined to the question whether or not the building has been provided with the means of escape in case of fire in accordance with the plans as approved by the county council or by the tribunal of appeal upon an appeal to them within two months after the county council have refused to approve or conditionally approved the plans. The answers to the questions will be as my brother Hamilton has stated.

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Appeal allowed. (1)

Solicitor for appellants: *E. Tanner.*

Solicitors for respondent: *Bennett & Ferris.*

W. F. B.

[IN THE COURT OF APPEAL.]

JENKINS *v.* GREAT WESTERN RAILWAY.

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Railway Company — Negligence — Fence adjoining Highway — Protection of Children — Invitation to enter Land on other side of Fence.

The plaintiff, a child two and a half years old, lived with his parents in one of a row of houses in front of which was a highway. On the other side of the highway there was a fence of posts and rails belonging to and repairable by a railway company. Inside the fence, on the company's premises, there were a siding, a pile of wooden railway sleepers (distant two and a half inches from the fence), and, beyond them and about thirty-five yards in a direct line from the plaintiff's parents' house, the main line of the company's railway. The plaintiff got or was assisted over or through the fence and when on the main line was run over by an express train of the company, sustaining serious injury. In an action against the company for damages the jury found that the plaintiff got on to the line over or through the fence; that the company's servants knew that children were in the habit of playing on the pile of sleepers, but not that they were in the habit of getting on the main line, and that the evidence did not bring home knowledge to any particular servant, but that there must have been knowledge on the

(1) The case was remitted to the tribunal of appeal with a direction that the original appeal to them should have been dismissed.

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part of some of the company's servants; that the fence was not a reasonably fit fence for the purpose of separating the railway from the high road, having regard to the proximity of the houses on the other side of it; that children were in the habit of getting on to the pile of sleepers over or through the fence by the leave or licence of the company, but not elsewhere, and that the defendants, having regard to all the circumstances, were guilty of negligence in not taking some sufficient means of preventing children from getting on to the line:—

Held, that the leave and licence (if any) to play on the pile of sleepers was confined to that spot, and did not extend to the main line; that there was no duty on the company to fence off the sleepers from the rest of their land, and that they were not liable.

Cooke v. Midland Great Western Railway of Ireland [1909] A. C. 229, distinguished.

APPEAL from Bankes J.

Action by the plaintiff, William Allen Jenkins, an infant, about two and a half years old, suing by his next friend.

The statement of claim alleged that the plaintiff lived with his parents in a house which was one of a row of houses adjacent to the highway from Swansea to Neath, which highway was much frequented by young children living in the neighbourhood; that on the opposite side of the highway there was the defendants' railway on the same level as the highway and separated therefrom by a wooden rail fence which was not adequate for the protection of young children using that highway; that in the fence there was a gate with bars so far apart as to form no protection for young children, and which was habitually left open, and that the plaintiff left the said house without the knowledge of his parents and proceeded along the highway and through the gateway (the gate being open and the opening unguarded), and, alternatively, through the said fence or gate, on to the railway; and that whilst there a train of the defendants, driven by the company's servants, was negligently driven against the plaintiff, causing him serious injuries and cutting off his right foot.

At the trial before Bankes J. and a special jury at the Swansea Assizes the evidence shewed that opposite the house of the plaintiff's parents there was the highway above mentioned, then a fence, then a pile of sleepers just inside the fence, then a siding, and then the main line; that the distance from the house to the

scene of the accident, on the main line, was about thirty-five yards, and that the fence between the highway and the company's premises had longitudinal rails, three inches thick, the distances between them being four inches between the ground and the first rail upwards, four and a half inches between that rail and the second one, five inches between the second and third rails, nine inches between the third and fourth rails, and about ten inches between the fourth and top rails; and that the fence, such as it was, was in good repair. Beyond the siding, in one particular place there was a pile or stack of wooden sleepers, which were within a distance of two and a half inches from the fence, and children were in the habit of playing on the pile of sleepers.

The following questions were put by Bankes J. to the jury and answered by them:—

Q. 1: "Did the infant plaintiff get on the railway line over or through the fence separating the high road from the railway?"

A.: "Yes." Q. 2a: "Did the defendants by any and which of their servants know that children were in the habit of getting on

to the railway line over or through the said fence?" A.: "The railway servants knew that children were in the habit of playing

on the pile of sleepers, but did not know that children were in the habit of getting on to the main line, and we cannot agree

about the siding line, that is the line of rails next the fence and the main line. The evidence, in our opinion, does not bring

home knowledge to any particular servant." Q. 2b: "If the evidence, in your opinion, does not bring home knowledge to any

particular servant, do you think that some of the defendant company's servants must have known?" A.: "Yes." Q. 3: "Was

the said fence a reasonably fit fence for the purpose of separating the railway from the high road having regard to the proximity

of the houses on the opposite side of the road?" A.: "No." Q. 4: "Were children in the habit of getting on to the line over

or through the said fence by the leave or licence of the defendant company?" A.: "Children were in the habit of getting on to

the pile of sleepers over or through the said fence by the leave or licence of the defendant company, but to nowhere else."

Q. 5: "Did the persons in charge of the engine keep a reasonably sufficient look-out for the purpose of seeing whether any

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child was on the line?" A.: "Yes." Q. 6: "Were the men on the engine negligent in not bringing the train to a stop more quickly than they did?" A.: "No." Q. 7: "Were the defendants having regard to all the circumstances, including your answer to question 2, guilty of negligence in not taking some sufficient means of preventing children getting on to the line?" A.: "Yes."

The jury found for the plaintiff and awarded 200*l.* damages with an agreed sum for special damage.

On the findings Bankes J. gave judgment for the defendant company.

The plaintiff appealed, and by his notice of appeal asked that the judgment might be set aside and judgment entered for the plaintiff upon the ground that on the findings of the jury the judgment was wrong, and, alternatively, that a new trial should be directed on the ground that the jury disagreed as regarded a material part of question 2a.

Ellis Griffith, K.C., and *J. G. Pease*, for the appellant. The case for the plaintiff at the trial was founded on negligence and an invitation to the plaintiff to go on to the line. The effect of the findings of the jury is: (1.) That the fence was not reasonably fit for the purpose of separation, having regard to the children in the neighbouring houses. (2.) That plaintiff got on to the railway line through or over the fence. (3.) That children were in the habit of playing on the sleepers. (4.) That the company's servants knew this. (5.) That the jury were not agreed whether the company's servants knew that children were in the habit of going on to the siding line. (6.) That the company was guilty of negligence in not taking sufficient means to prevent children coming on to the line.

There is no suggestion that the fence was out of repair, although the evidence shews that children could and did get through it.

There was negligence in these matters on the part of the company. The fence was not reasonably fit; the company gave leave and licence to children to play on the sleepers; and as the sleepers were on the company's premises, the company invited and permitted the children to approach the place of danger.

The case is therefore within *Cooke v. Midland Great Western Railway of Ireland*. (1) There as soon as the child got through the gap in the hedge, and for some distance, there was no danger ; but when the child got to the turntable, where the accident occurred, there was danger ; and, as the company's servants knew that children were in the habit of playing with the turntable, the company was held liable. Both in that case and this there was an ineffective fence.

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It is submitted that the company cannot limit its licence to an entry on two or three yards of their land. There being negligence as regards the fence, the moment the child, through that negligence, got on to the company's premises it was in a place of danger, and a new duty arose.

After the children had been allowed on the sleepers new duties arose—first to fence off the siding, and then to fence off the main line. If, in *Cooke's Case* (1), there had been a dangerous pit within forty yards of the turntable and the company's servants had never seen any children go beyond the turntable, it could not be said that the leave and licence was to be limited to the turntable.

Lord Atkinson in *Cooke's Case* (2) says : “ The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must . . . be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons.” That applies here, for the company knew that children of tender years were in the habit of going through or over this fence, and accustomed to go on the sleepers ; they knew that children entered upon the premises of the railway, and, by their knowledge of the habits and propensities of children, they must have known that their propensity was to go forward.

[FARWELL L.J. referred to *Schofield v. Bolton Corporation*. (3)]

That case is distinguishable, because there there was no act of omission and no negligence. The sandpit and the line belonged to different owners.

B. Francis Williams, K.C., and *Clive Lawrence*, for the defendant company, were not called on.

(1) [1909] A. C. 229.

(2) [1909] A. C., at p. 238.

(3) (1910) 26 Times L. R. 230.

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COZENS-HARDY M.R. This is an appeal from the judgment of Bankes J. and the verdict of a jury. I think the question can scarcely be better dealt with than it was by Bankes J. after the findings of the jury had been given.

It is necessary that I should state very shortly the admitted facts. The plaintiff, a child, was two and a half years old. The child's parents lived in a house close by a branch of one of the main lines of the Great Western Railway Company. On the northern side of the main line there is what is called a relief line, or an avoiding line. Beyond that there is a siding with some carriages on it. Beyond that in one particular place there are some stacks of timber which are within a distance of two and a half inches from the fence, that space being, of course, obviously insufficient for a child of two and a half years to get through. The fence was in perfectly good repair. It is a fence with rails three inches thick, narrower at the bottom—four inches at the bottom, next four and a half, next five, next nine, and next ten. On the north side of the fence there is the public road.

The child got on to the main line of the railway and was knocked down and seriously injured, and in respect of that a claim for damages is brought. The jury were asked a series of questions by the learned judge, and found that the infant did get on to the railway over or through the fence separating the high road from the railway. That, of course, was obviously right. The jury also found that the railway servants knew that children were in the habit of playing on the pile of sleepers, that is the stacks of timber which I have mentioned as being within two and a half inches of the fence itself, but did not know that children were in the habit of getting on to the main line, and the jury could not agree about the siding line, that is the line of rails next the fence and the main line. The evidence in their opinion did not bring home knowledge to any particular servant. The next question, 2b, is this: "If the evidence in your opinion does not bring home knowledge to any particular servant, do you think that some of the defendant company's servants must have known?" That I should have thought was—I say so with great respect to the learned judge—a doubtful question, and the answer also seems to me to be

doubtful. A considerable number of witnesses were called, namely, the local officials whose duty called them to this spot. They were all examined and cross-examined, and have negatived the knowledge, and the only suggestion was that there were two gangers employed by the railway company who occupied some of these cottages, and they were not called. Then question 3 was: "Was the said fence a reasonably fit fence for the purpose of separating the railway from the high road having regard to the proximity of the houses on the opposite side of the road?", to which the jury answered "No." Question 4 was: "Were children in the habit of getting on to the line over or through the said fence by the leave or licence of the defendant company?" The answer to this was: "Children were in the habit of getting on to the pile of sleepers over or through the said fence by the leave or licence of the defendant company, but to nowhere else." Then come questions 5 and 6, to which I need not refer, because the jury negatived any negligence on the part of the driver of the train. Then there is finally question 7, which is a sort of summing-up question: "Were the defendants, having regard to all the circumstances, including your answer to question 2, guilty of negligence in not taking some sufficient means of preventing children getting on to the line?" The answer to this question was "Yes."

Now, taking these findings most favourably to the plaintiff, it seems to me that they amount to this: The railway authorities must be taken to have known that children did get on to the stacks of timber, which were, in fact, adjacent to the fence—two and a half inches off is, of course, nothing—and they must be taken to have given permission or leave and licence to go there and get over the fence on to the stacks of timber, and to play there. But the jury negatived expressly that the railway authorities had any knowledge at all of any leave or licence to any children to go on to the main line. That, I think, is the utmost extent to which the evidence and the findings go.

But then it is said, "That is negligence, because if any one got on to the stacks of timber, the leave and licence which the railway company gave imposed upon them a duty to fence off that stack of timber from everything to the south, so as to

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1911 zone, where trains might be passing."

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I think there are two answers to that. In the first place, this poor little child did not go to the only place where the leave and licence to go was given by the company. This child did not go to the stacks at all, and I fail to see, when once that is granted, how any case whatever has been made against the railway company. Even apart from that, can it be said that a child, who was permitted to go to the stacks of timber, and play on the stacks of timber, is entitled to say against the railway company, "You ought to have fenced off that stack; you ought to have been aware that the invitation to children to trespass is irresistible, and to go on to the railway to play in the zone of danger and meet with an accident"? I cannot follow that. It is sought, in Mr. Ellis Griffith's very able argument, to say that this is really strictly following *Cooke v. Midland Great Western Railway of Ireland* (1) in the House of Lords. As I understand that case (and I desire loyally to follow that decision), it was nothing of the kind. In *Cooke's Case* (1), on a field belonging to the railway company, which could be got into by means of a gap in the fence some three feet wide, there was a turntable, unlocked, and therefore a dangerous machine. From this gap to the turntable there was almost a defined path, shewing that it was a place frequented by children, and to the knowledge of the railway company. There was, as Lord Collins (2) said, not merely a licence but an invitation to children to go and play with this dangerous machine on the company's property, and all the House of Lords decided was that in those circumstances, where there was not merely a licence to go and play with this machine, but almost an invitation to play with it, that licence and that invitation did impose upon the railway company the duty of taking reasonable precautions to prevent the turntable being used so as to be dangerous to children. I fail to see what bearing that has upon the present case. There was no danger in this case in the only place where licence was given to the children to come, namely, the stack of timber. It is not as though the child had got on to the stack of timber and fallen off, or anything of that kind. We

(1) [1909] A. C. 229.

(2) [1909] A. C. at p. 241.

are dealing here with the case of a child who, as I understand it, could not have got through the fence himself without help. He must have been helped over; that is certain. He did not get to the place where leave and licence alone extended to. That being so, I think we should be most unduly and most irrationally extending *Cooke's Case* (1) if we were to hold that it applied to the present case. In my opinion, the learned judge was quite right in what he said: "I think the decision of the House of Lords depends, at any rate mainly, upon the question of leave and licence. It may be that Lord Macnaghten states or intends to state a wider principle—but at any rate it is founded upon knowledge that the child is using the particular place. I think that where you fail to satisfy the jury that any particular servant knew, and you have really exhausted all the people who are likely to know—I ought to say that there is really no evidence of a knowledge on the part of the servants of the company. But whether that is so or not, there is a finding against the plaintiff of leave and licence to use this particular place and a finding against him as to knowledge with regard to using the particular place—the main line—and there is no finding in the plaintiff's favour about using the part of the line between the fence and the main line."

In my opinion the judgment which the learned judge gave on those findings of the jury was perfectly correct and sound in law, and this appeal must be dismissed with the usual consequences.

FLETCHER MOULTON L.J. I am of the same opinion. I share with the judge the doubt as to whether any knowledge has been brought home to the railway company. It is not sufficient to say that some servant of the railway company must have known of this. It depends on what servant it was. The knowledge of an errand boy employed by the railway company is not knowledge of the company, and to have a vague finding that some of the defendants' servants must have known of this, and to deduce from that some knowledge which must be imputed to the company, and thereby a licence imputed from the company to the children to play on these sleepers, appears to me to be a series of very

(1) [1909] A. C. 229.

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dangerous steps. But putting all this aside, the verdict which the jury have found is that children went on to the sleepers by the leave and licence of the company, and that they had leave and licence to go nowhere else. Now in the present case there is not the slightest evidence that this particular child knew of the existence of the leave and licence, or that it availed itself of it to go on to the sleepers. If you examine *Cooke's Case* (1), to which we have been so repeatedly referred, the ground of the decision was that there was leave and licence to play with the turntable, and that it was because the person availed himself of that leave and licence to play with the turntable that the injury occurred. In the present case there is no reason for saying that the child availed itself of the leave and licence, and if it did not, the leave and licence could not possibly have caused the injury.

For these reasons, and for the reasons given by the Master of the Rolls, I am of opinion that the decision appealed against is right and that this appeal should be dismissed with costs.

FARWELL L.J. I am of the same opinion. When the invitation or leave and licence depends not on actual but on imputed knowledge, it appears to me that it must be limited by the knowledge which is proved to exist in the landowner over whose land and on whose land the accident has taken place. The invitation in *Cooke's Case* (1) was to play with the turntable, which was defective, and by reason of that defect the child was hurt. In this case I doubt if such invitation as has been proved could be shewn to have extended to a child of two and a half years old so as to relieve the parents of all responsibility for letting the child go, but assuming that it could, the only invitation was to play on the timber, which is not an unnatural or dangerous place for children to play, and one would be sorry to compel companies or landowners to refuse to let children play in such a place, where perhaps they are safer out of the way of motors on the high road. However that may be, the only leave and licence is to play on the timber. Beyond the timber there is the siding. There is no finding of the jury nor is there evidence

(1) [1909] A. C. 229.

that any child was ever seen playing on the siding. Beyond the siding there is the main line, where the accident took place, and we are asked to say that *Cooke's Case* (1) would have been decided as it was if the children who were invited to go and play with the turntable had strayed on to the other side of the field, and had there fallen into the ditch, although they had never before been known to go over to the ditch, and although there was no evidence whatever of any invitation or leave and licence except up to the turntable; and having so read *Cooke's Case* (1) to hold that it governs this.

In my opinion, that would be an undue extension of the doctrine in *Cooke's Case* (1), and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Frank Patteson, for Edward Harris, Swansea.*

Solicitor for the company: *L. B. Page.*

F. E¹

EASTON v. HITCHCOCK.

1912

Jan. 26.

Contract—Employment requiring Secrecy—Private Inquiry Agent—Implied Warranty of Secrecy by—Betrayal of Secret by former Servant.

Although it is essential to the proper conduct of the business of a private inquiry agent that it should be conducted with secrecy, a person carrying on such a business does not impliedly warrant to his clients that the servants employed by him in it will not, after they have left his service, disclose to the clients' prejudice information acquired by them in the service.

Query, whether any such warranty is to be implied with respect to disclosures made by a servant while still in the service.

APPEAL from the Brompton County Court.

The plaintiff, a female private detective or inquiry agent, was employed by the defendant, a married woman, to watch her husband. The employment began on January 4, 1911, and continued down to the first week in April. The plaintiff

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employed various men to watch the defendant's husband, including a man named Davis, whom she employed for that purpose for three days in the early part of January. In February Davis, who was at that time no longer in the plaintiff's service, informed one Gardiner, who had been employed as a watcher by the plaintiff for a few days about two years before and had not been employed by her since, that he had been watching the defendant's husband. Gardiner on February 21 communicated to the husband that he was being watched, after which date the observations conducted by the plaintiff for the defendant were necessarily useless. The plaintiff in the advertisements of her business stated as an inducement to clients to employ her that it was conducted with secrecy. The defendant on hearing from her husband that he had been told he was being watched refused to pay the plaintiff's charges for work done after February 21. The action was brought to recover those charges. The county court judge gave judgment for the plaintiff. The defendant appealed.

Norman Craig, K.C., and Storry Deans, for the defendant. It was absolutely essential that the fact of the watching should be kept from the knowledge of the person watched if it was to be of any value. There must be implied a warranty by the plaintiff that the persons engaged by her were trustworthy and would not improperly disclose information acquired by them in her service. And that warranty must extend to disclosures made at a time when the persons making them have ceased to be in the plaintiff's employment. The risk that the services rendered by the plaintiff would be valueless would be very great if it did not.

Compton Smith, for the plaintiff, was not called upon.

HAMILTON J. The question we have to decide is a novel one. The plaintiff is a person who carries on the business of watching others for reward. The defendant is a married woman who for certain reasons wanted to have her husband watched, and she employed the plaintiff for that purpose. The plaintiff in the advertisements of her business stated that it was conducted with secrecy, and it is obvious that if a considerable degree of secrecy

was not observed her services would be altogether ineffective. The plaintiff in pursuance of the employment put on various men to watch the defendant's husband, and it was for the balance of account for the services of those men in watching that the action was brought. Those services, however, so far as they consisted in watching after February 21, were useless, for the husband was on that date informed that he was being watched. It appears that a man named Davis, who had been employed as a watcher by the plaintiff for three days in the early part of January, knew a man named Gardiner, who had also been in the plaintiff's employment for a short time about two years before. Davis after he had left the plaintiff's service told Gardiner that he had been engaged in watching the defendant's husband, whereupon Gardiner conveyed that information to the husband. Under those circumstances the county court judge was asked to hold that there was an implied warranty by the plaintiff that the men employed by her as watchers would maintain secrecy as to their employment, not merely while they were in the plaintiff's service, but also after they had left it, and that in the event of a breach of that warranty the plaintiff could not recover. The judge declined, and in my opinion rightly, to hold that any such warranty could be implied. Whether a warranty ought to be implied that the servants would not commit breaches of secrecy while they were still in the plaintiff's service I express no opinion, but I think it impossible to hold that the plaintiff warranted that her servants would not make improper disclosures after they had ceased to be in her employment. In the course of argument I asked whether there was any case in which a solicitor had been held liable because a person who had once been in his employment as a clerk divulged information relating to a client, but none such was forthcoming. If the warranty is to be held to continue for ever so short a time after the servant has left the service it will be impossible to fix any limits of time for its continuance or to define the circumstances in which it is to apply. If it is to continue for a week it must equally hold good during the whole of the departed servant's life; and if the employer is to be held to warrant that the servant will not wilfully disclose information he must equally be held to warrant that he will not do so negligently, or even as

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the result of a venial indiscretion. In the absence of authority we cannot hold that such a warranty as that contended for exists. The rule is that in all cases of implied warranty "the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have": per Bowen L.J., *The Moorcock*. (1) If a person who employs an agent of this description wishes to protect himself against breaches of confidence by the agent's servants he should expressly stipulate in the contract to that effect. The appeal must be dismissed.

LUSH J. I am of the same opinion. The services which the plaintiff agreed to render to the defendant were those of watching a particular person, and by watching is to be understood secretly watching him. If the services were rendered useless by the conduct of the plaintiff herself or of any person for whom she was responsible she could not recover in respect of them. But here the services were rendered useless, not by any act or want of care on the part of the plaintiff, but by the act of a person for whom she was not responsible. Therefore there seems to me to be no answer to the plaintiff's claim.

Appeal dismissed.

Solicitor for plaintiff: *Newton G. Driver.*

Solicitors for defendant: *Stanley, Woodhouse & Hedderwick.*

(1) (1889) 14 P. D. 64, at p. 68.

J. F. C.

ATTORNEY-GENERAL *v.* BODEN AND ANOTHER.

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Revenue—Estate Duty—Property passing on Death—Goodwill of a Business—Partnership Deed—Bona fide Purchase—Full Consideration in Money's Worth—Interest ceasing on Death—Interest provided by Deceased—Interest reserved to Settlor—Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2, 3, 7.

March 30, 31;
April 1, 3,
4, 5.

By s. 1 of the Finance Act, 1894, estate duty is, except as in the Act provided, payable upon the principal value of all property which passes on the death of every person dying after the date therein mentioned.

By s. 2, sub-s. 1, property passing on the death of the deceased is deemed to include . . . (b) property in which the deceased had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; . . . (c) property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections extended to real property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom; and (d) any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

By s. 3, sub-s. 1, estate duty is not payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes . . . where such purchase was made for full consideration in money or money's worth paid to the vendor . . . for his own use and benefit.

By s. 7, sub-s. 5, the principal value of any property is estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.

By s. 7, sub-s. 7, the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased is, (a) if the interest extended to the whole income of the property, the principal value of that property; and (b) if the interest extended to less than the whole income of the property, the principal value of an addition to the property equal to the income to which the interest extended.

By s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, the personal or movable property to be included in an account shall be (inter alia) any property passing under any settlement by deed or other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor.

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A father and his two sons carried on the business of lace or plain net manufacturers under a deed of partnership which included covenants (among others) to the following effect :—Neither of the sons was, without the consent of the father, to be directly or indirectly engaged in any trade or business except on account and for the benefit of the partnership; both the sons were bound to give so much time and attention to the business as the proper conduct of its affairs required; the father was not bound to give more time or attention to the business than he should think fit; if the father should die his share was to accrue to the sons in equal shares, subject only to their paying out to his representatives the value of his share and interest at his death as ascertained by an account to be made as on the day of his death with all proper valuations, but without any valuation of or allowance for goodwill, which goodwill was to accrue to the sons in equal shares.

The father died. The value of his share and interest at his death was ascertained by an account taken as directed by the deed of partnership without any valuation of or allowance for goodwill. The share and interest so ascertained amounted to a large sum, and estate duty was paid on that sum.

The Crown claimed estate duty on the value of the father's share in the goodwill on the ground that it was (1.) property which passed on the death of the father within s. 1 of the Finance Act, 1894, or (2.) property in which the deceased had an interest ceasing on his death in which a benefit accrued or arose to the sons by the cesser of that interest within s. 2, sub-s. 1 (b), of the Act, or (3.) property passing under a settlement by deed whereby an interest for life was reserved to the father, and therefore property which would be required on the death of the father to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, as further amended by and within the provision of s. 2, sub-s. 1 (c), of the Finance Act, 1894, or (4.) an interest provided by the father in which a beneficial interest accrued or arose by survivorship on his death within s. 2, sub-s. 1 (d), of the Act.

The Court deciding on the evidence that the goodwill of the business was of small value :—

Held, that, having regard to the obligations of the sons under the partnership deed, the share and interest of the father in the goodwill of the business passed on the death of the father to the sons by reason only of a bona fide purchase for full consideration in money's worth paid to the father for his own use and benefit, within the meaning of s. 3, sub-s. 1, of the Act.

Held, also, that this was a question for the Court, and not for the Commissioners under s. 7 of the Act, to determine.

Held, further, that the share and interest of the father in the goodwill of the business was not (1.) property which passed on the death of the father within s. 1 of the Act, nor (2.) an interest for life reserved to the father within the meaning of s. 38, sub-s. 2 (c), of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, and as further amended by and within the provision

of s. 2, sub-s. 1 (c), of the Act, nor (3.) an interest provided by the deceased within s. 2, sub-s. 1 (d), of the Act; but

Held, that it was a benefit accruing or arising to the sons by the cesser of an interest which the father had in property and which ceased on his death, within s. 2, sub-s. 1 (b), of the Act.

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INFORMATION by the Attorney-General claiming estate duty.

I. By an indenture dated May 16, 1893, and made between Henry Boden (since deceased) of the first part, Walter Boden (since deceased) of the second part, and the defendant Henry Walter Degge Shuttleworth Boden (who was the son of Henry Boden and is hereinafter called H. S. Boden) of the third part, after reciting that a partnership had until recently existed between Henry Boden and Walter Boden as lace manufacturers under the style or firm of Boden & Co., and that Henry Boden and Walter Boden had agreed to admit H. S. Boden into partnership with them upon the terms and subject to the stipulations and provisions thereafter expressed and contained, it was witnessed that the parties should become and remain partners for the purposes and subject to the stipulations and provisions thereafter expressed and contained (that is to say):—

1. That the business of the partnership should be that of lace manufacturers and should be carried on at Derby, Chesterfield, and Belper in the county of Derby, at the town of Nottingham, and at Chard in the county of Somerset, or at such other place or places as the partners might thereafter agree upon.

2. That the partnership should be carried on under the style or firm of Boden & Co.

3. That the partnership should commence on January 1, 1893, and should continue for the term of ten years.

4. That the capital of the partnership should consist of the sum of 105,445*l.* 13*s.* 9*d.*, and should be considered as having been brought into the business in the following amounts (that is to say), by the said Henry Boden the sum of 53,654*l.* 16*s.* 8*d.*, by the said Walter Boden the sum of 51,646*l.* 2*s.* 6*d.*, and by the said H. S. Boden the sum of 144*l.* 14*s.* 7*d.*, and that all matters connected with the management or affairs of the business should be in the joint absolute control of Henry Boden and Walter Boden only, and that their voting power should be equal.

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13. That the partners should be entitled to the net profits of the business in the shares following (that is to say), Henry Boden to nine twentieth shares, Walter Boden to nine twentieth shares, and H. S. Boden to two twentieth shares, but so nevertheless that H. S. Boden should be entitled to receive in each year the sum of 1000*l.* in case the net profits for that year (without reckoning interest on capital) should amount to that sum, or if not then such less sum as the net profits should amount to before the other partners should receive anything for that year.

15. That if any partner should die before the expiration of the term of ten years the partnership thereby created should immediately cease and determine.

16. That in case any partner should die before the expiration of the term his share in the capital of the partnership (to be ascertained as thereafter provided) should, if required by the surviving partners or partner, remain as a loan to them or him during the residue of the term of ten years, bearing interest as therein mentioned, and that the repayment of the loan at the end of the term together with interest thereon should be secured to the representative of the deceased partner at the expense and by the joint and several bond of the surviving partners or partner.

17. That immediately upon the decease of any partner a full and proper account and valuation should be duly and properly taken and made by the surviving partners or partner, and the executors or administrators of the deceased partner, and that due provision should be made for the payment of all debts then due from the partnership and for the discharge of all other liabilities thereof, provided that in taking such account and valuation nothing should be allowed for the goodwill of the business.

18. That within six calendar months after the expiration of the partnership by effluxion of time the affairs of the partnership should be wound up as therein mentioned, and that after providing for debts and liabilities the residue of the partnership assets should be divided among the partners according to their respective rights and interests therein.

19. That at any time after the defendant Reginald Sam Boden (who was another son of Henry Boden and is hereinafter called R. S. Boden) should have attained the age of twenty-five years

Henry Boden might with the consent of the other partners introduce R. S. Boden into the partnership and might assign to him any part of his share for the time being in the partnership, and that thereupon R. S. Boden should upon executing such deed as was therein mentioned become a partner with the parties thereto during the residue of the term of ten years, and that until R. S. Boden should attain twenty-five he should be employed in the business at a salary of 200*l.* per annum commencing as from the date of the now stating indenture, and to be gradually increased as therein mentioned.

II. On December 31, 1902, the partnership constituted by the indenture of May 16, 1893, expired by the effluxion of time, but until the death of Walter Boden hereinafter mentioned Henry Boden, Walter Boden, and H. S. Boden continued to carry on the business in co-partnership upon the terms of the indenture.

III. Walter Boden died on September 16, 1905, and thereupon the value of his share in the capital of the partnership was ascertained as provided for by article 17 of the indenture of May 16, 1893, and was in due course paid to his executors by Henry Boden. The sum so paid amounted to upwards of 50,000*l.*

IV. After the death of Walter Boden, Henry Boden and H. S. Boden continued until the establishment of the partnership between Henry Boden and the defendants hereinafter mentioned to carry on the business. R. S. Boden was from May 16, 1893, until he became a partner as hereinafter mentioned employed in the business.

V. By an indenture dated January 30, 1907, and made between Henry Boden of the first part, H. S. Boden of the second part, and R. S. Boden of the third part, after reciting that Henry Boden and H. S. Boden with Walter Boden (then deceased) had carried on business in partnership as lace manufacturers at Derby, Chesterfield, and Belper in the county of Derby, and in the town of Nottingham, and at Chard in the county of Somerset, and reciting that Walter Boden had recently died, and that the value of his share and interest in the business had been ascertained and was in course of payment out to his executors by Henry Boden, and reciting that Henry Boden and H. S. Boden had agreed to admit R. S. Boden into partnership

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with them in the business, and that the business should be carried on by them in partnership upon the terms and subject to the stipulations and provisions thereafter contained, it was witnessed (amongst other things) as follows:—

1. Henry Boden, H. S. Boden, and R. S. Boden shall become and be partners for the purposes and subject to the stipulations and provisions hereinafter contained.

2. The business of the partnership shall be that of lace manufacturers, and shall be carried on at Derby, Chesterfield, and Belper in the county of Derby, and at the town of Nottingham, and Chard in the county of Somerset, or at such place or places as the partners may determine.

3. The partnership shall be carried on under the style or firm of Boden & Co.

4. The partnership shall commence as from July 1, 1906, and shall continue during the residue of the life of Henry Boden if any two of the partners shall so long live, and if both H. S. Boden and R. S. Boden shall survive Henry Boden then the partnership between the said H. S. Boden and R. S. Boden shall continue for the further period of two years from the death of Henry Boden if both H. S. Boden and R. S. Boden shall so long live. The death or retirement of any partner shall not dissolve the partnership between the remaining partners so long as there shall be two such remaining partners.

7. Neither the said H. S. Boden nor R. S. Boden shall without the consent of the other partners, either alone or with any other person, either directly or indirectly, be engaged in any trade or business except upon the account and for the benefit of the partnership.

8. All the assets of the business of Boden & Co. as existing immediately before the commencement of the present partnership shall become and be the assets of the firm hereby constituted subject to the payment thereof of all the then existing liabilities, including in particular any balance remaining unpaid of the ascertained liability to the executors of the said Walter Boden, deceased.

9. The business of the partnership shall be considered as divided into two branches, of which the business carried on at

Chard as aforesaid is hereinafter called "the Chard branch," and the business carried on at Derby, Chesterfield, Belper, and Nottingham and elsewhere (except only at Chard) is hereinafter called "the Derby branch." The books and accounts of the Chard branch shall be kept entirely distinct from those of the Derby branch.

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10. The accounts heretofore kept in connection with the Derby branch called respectively the "merchant account" and the "gassing account" shall be continued to be kept as separate accounts as heretofore.

11. Each partner's capital account in the partnership books shall be credited as on the day of the commencement of the partnership with the amount (if any) standing to the credit of his capital account immediately before such commencement in the books of the previous partnership, separate capital accounts being kept as aforesaid for the Derby branch and the Chard branch.

12. Interest shall be allowed on partners' capital account at 5l. per annum, such interest to be paid half-yearly on the first day of January and the first day of July in every year before any division of profits.

13. H. S. Boden shall be entitled to receive by way of salary the yearly sum of 500l. from the Chard branch and R. S. Boden shall be entitled to receive by way of salary the yearly sum of 500l. from the Derby branch. The above salaries shall be paid quarterly on the usual quarter days.

14. The partners shall be entitled to the net profits of the business as follows:—

(a) As to the merchant account, the whole to Henry Boden subject to an arrangement made with William Richardson, the manager at Derby, whereunder William Richardson is entitled to a salary by way of commission in a sum equal to one-third of the net yearly profits of that account, which salary Henry Boden alone is to pay.

(b) As to the gassing account, the whole to Henry Boden subject to an arrangement made with George T. Nelson, the manager at Nottingham, whereunder the said George T. Nelson is entitled to a salary by way of commission in a sum equal to

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one-tenth of the net yearly profits of that account, which salary Henry Boden alone is to pay.

(c) Subject as aforesaid the net profits of the Derby branch shall be divided between Henry Boden, H. S. Boden, and R. S. Boden in the proportion of 65 per cent., 15 per cent., and 15 per cent. respectively, an arrangement having been made with the said William Richardson and George T. Nelson under which each of these two persons is entitled to an additional salary by way of commission in a sum equal to $2\frac{1}{2}$ per cent. of the total yearly net profits of the Derby branch (excluding the merchant and gassing accounts).

(d) The net profits of the Chard branch shall be divided as follows: Between Henry Boden, H. S. Boden, and R. S. Boden in the proportion of seven-ninths, one-ninth, and one-ninth respectively, but arrangements having been made with the said William Richardson and George T. Nelson under which each of them is entitled to an additional salary by way of commission of a sum equal to one-ninth of the total yearly net profits of the Chard branch, Henry Boden is alone to pay the whole of such additional salaries out of his seven-ninths, and also Henry Boden is during his own life to pay over two of such seven-ninths to H. S. Boden, so that during the life of Henry Boden, but no longer, H. S. Boden's share shall in effect be three-ninths as against R. S. Boden's one-ninth. The partners are to bear losses in the same proportions. Provided always that in case the share of profits of the said H. S. Boden and R. S. Boden from the Derby branch shall in any year during the life of the said Henry Boden be less than 1000*l.*, such share shall be made up to that sum by the said Henry Boden, it being the intention that the minimum yearly payments to the said H. S. Boden and R. S. Boden including the salaries mentioned in clause 13 and their share of the profits from the Derby branch shall not in any year during the lifetime of the said Henry Boden be less than 1500*l.*

16. Both H. S. Boden and R. S. Boden shall be bound to give so much time and attention to the business of the partnership as the proper conduct of its affairs shall require. Henry Boden shall not be bound to give more time or attention to such business than he shall think fit.

17. If Henry Boden shall die or otherwise cease to be a partner his share shall accrue to H. S. Boden and R. S. Boden in equal shares subject only to their paying out to his representatives the value of his share and interest at his death as ascertained by a special general account to be made as on the day of his death with all proper valuations, but without any valuation of or allowance for goodwill, which goodwill shall accrue to the said H. S. Boden and R. S. Boden in equal shares. The amount so payable to his representatives to be paid, if desired, by twenty equal half-yearly instalments at intervals of six calendar months, the first instalment to be paid at the expiration of twelve months after his death, and the amount for the time being remaining unpaid to carry interest at 5 per cent. payable half-yearly, the first half-yearly payment of interest to be made at the expiration of six calendar months from his death.

18. If either H. S. Boden or R. S. Boden shall die or otherwise cease to be a partner his share is to accrue to the other partners in the proportion of their existing shares, subject to such other partners paying out to his representatives the value of his share and interest at his death as ascertained by such general account as aforesaid, except that goodwill is to be valued and allowed for in such account at the rate of three times the average net yearly share in the profits of the said business during the three preceding years of the partnership or from the commencement of the partnership if less than that time. Payments shall be made by the like instalments and with the like interest as in the case of the death of the said Henry Boden.

19. Annual general accounts shall be taken in accordance with the existing practice of Boden & Co.

20. In all matters not hereby otherwise provided for the existing practice of Boden & Co. shall continue as heretofore.

VI. From and after the execution of the said indenture of January 30, 1907, until the death of Henry Boden hereinafter mentioned, Henry Boden and the defendants carried on the business in the co-partnership as provided for by and upon the terms of the indenture.

VII. The defendants allege that the capital of the respective

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partners was not ascertained or credited as provided for by clause 11 of the indenture of January 30, 1907, but that on July 1, 1907, such capital was ascertained and credited as follows (namely): Henry Boden, 145,425*l.* 15*s.* 7*d.*; H. S. Boden, 13,806*l.* 11*s.* 10*d.*; R. S. Boden, 9393*l.* 15*s.* 1*d.* The informant, though charging that Henry Boden was at all material dates entitled to by far the largest share in the capital of the partnership, makes no admission as to the accuracy of the defendant's aforesaid allegations.

VIII. The informant further charges that during the lifetime of Henry Boden the whole or alternatively the larger part of the capital of the respective defendants in the partnership business was either provided by Henry Boden or represented accumulated profits to which the defendants were respectively entitled.

IX. The annual profits of the partnership business amounted to several thousands of pounds, and the goodwill of the business was at the date of the death of Henry Boden hereinafter mentioned of considerable value.

X. Henry Boden died on November 14, 1908, and thereupon his share in the partnership business and assets (including the goodwill thereof) accrued to the defendants in equal shares subject only to their making such payment as is mentioned in clause 17 of the indenture of January 30, 1907.

XI. Upon the death of Henry Boden the value of his share and interest in the partnership business and the assets thereof was ascertained as provided for by clause 17 of the indenture of January 30, 1907, no valuation or allowance being made of or for goodwill. The amount at which the value of the aforesaid share and interest was so ascertained was 186,734*l.* 10*s.* 10*d.*, and such sum has been or is being duly paid or accounted for by the defendants to the legal personal representatives of Henry Boden. The sum of 186,734*l.* 10*s.* 10*d.* has been duly included in the Inland Revenue affidavit and accounts upon which estate duty has been paid as on the death of Henry Boden, but the value of the share of Henry Boden in the goodwill of the business has not been included in any estate duty account.

XII. The informant charges that in the circumstances herein-

before stated the goodwill of the partnership business was to the extent of the share of Henry Boden therein property which passed on the death of Henry Boden and which the defendants acquired on such death without paying any consideration therefor. Such goodwill was in fact property in which Henry Boden had an interest ceasing on his death, and a benefit accrued or arose by the cesser of such interest.

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XIII. The informant further charges that in the circumstances hereinbefore stated the provision contained in clause 17 of the indenture of January 30, 1907, that in ascertaining the value of the aforesaid share and interest of Henry Boden no valuation or allowance should be made of or for goodwill but that such goodwill should accrue without payment to the defendants in equal shares, was not part of a commercial transaction but was an act of bounty by Henry Boden in favour of his sons the defendants.

XIV. Under these circumstances estate duty became upon the death of Henry Boden payable under s. 1 or (alternatively) under s. 1 and s. 2, sub-s. 1 (b), and s. 7, sub-s. 7 (b), or (alternatively) under s. 1 and s. 2, sub-s. 1 (c), or (alternatively) s. 2, sub-s. 1 (d), of the Finance Act, 1894 (1), upon the principal value as at such death of the share of Henry Boden of and in the goodwill of the partnership business. The Commissioners of Inland Revenue have caused application to be made to the defendants as the persons accountable for an account and payment of such duty, but the defendants refuse to pay the same and contend that no such duty is payable.

XV. If estate duty is payable in respect of the share of Henry Boden in the goodwill of the partnership business the rate of such duty will be 8 per cent.

The informant on behalf of His Majesty prayed that it might be declared that upon the death of Henry Boden estate duty at the rate of 8 per cent. became under the provisions of the Finance Act, 1894, payable upon the principal value as at such death of the share of Henry Boden of and in the goodwill of the partnership of Boden & Co.

The defendants in paragraph 8 of their answer to the information stated that at the death of Henry Boden his share and

(1) See note on p. 564, post.

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interest in the partnership business and the assets thereof was valued as it stood in the books of the partnership as a going concern.

In paragraph 9 they stated that no such asset as goodwill had ever appeared or been valued in the partnership books, nor could goodwill be a realizable asset of the firm unless (if even then) in the event of a voluntary sale of the whole of the firm's assets with restrictive stipulations against the defendants carrying on business under their own names or at all. Under the existing circumstances the alleged share of the said Henry Boden at his death in any goodwill of the firm was of no market value.

In paragraph 21 they contended that it was not the fact that in the circumstances stated in the information the goodwill of the partnership business was to the extent of the share of Henry Boden therein property which passed upon the death of the said Henry Boden and which the defendants acquired on such death without paying any consideration therefor. If and so far as there was any such goodwill in which Henry Boden had a share passing to the defendants on his death, they contended that the same was acquired by them under the partnership deed of January 30, 1907, for full consideration in money or money's worth. They stated, in so far as the matter was a question of fact, that there was no such property as goodwill in which Henry Boden had an interest ceasing on his death, and that no benefit accrued or arose by the cesser of such interest.

On the hearing of the information a considerable body of evidence was called by the defendants to prove that the goodwill of the business of Boden & Co. was of little if any value, and also as to the method adopted by the partners in valuing the partnership property from time to time. The effect of this evidence is fully stated in the judgment.

Sir John Simon, S.-G., and Austen-Cartmell, for the Crown. Henry Boden died possessed of an interest in the goodwill of the business of Boden & Co. That interest ceased on his death. To the extent of the value of his share a benefit accrued or arose to the defendants by the cesser of his interest. By s. 2, sub-s. 1 (b), of the Finance Act, 1894, that interest is included in

the expression "property passing on the death" of Henry Boden within the meaning of s. 1 of the Act.

Alternatively, Henry Boden's interest in the goodwill was property which must have been included in an account under s. 38, sub-s. 2 (c), of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, and as further amended by s. 2, sub-s. 1 (c), of the Finance Act, 1894, the goodwill being property which passed under a settlement made by the deceased by a deed whereby an interest in such property for life was reserved to the deceased as settlor.

In the second alternative, the goodwill of the business was an interest provided by the deceased, and, to the extent of the beneficial interest accruing or arising by survivorship to the defendants on the death of the deceased, was, by s. 2, sub-s. 1 (d), of the Finance Act, 1894, included in the expression "property passing on the death" of the deceased, and therefore liable to duty under s. 1.

The sum of 186,734*l.* paid by the defendants to the executors of Henry Boden as the value of his share in the partnership assets did not include anything as his share in the value of the goodwill. That is clear from article 17 of the deed of January 30, 1907. It was in fact the value of the deceased's share in the partnership assets apart from the goodwill of the business; though even if that sum did include Henry Boden's share in the goodwill, and even though estate duty has been paid by the executors on that share, that fact is no answer to a claim against the defendants, for they, and not the executors, are the persons liable for estate duty, since it was to them and not to the executors that Henry Boden's share in the goodwill passed on his death. The evidence called by the defendants as to the small value of the goodwill weighs light in the scales against the valuation of the partners themselves in article 18 of the deed of January 30, 1907. There the share of H. S. Boden or of R. S. Boden is valued at three times the average net yearly share in the profits of the business during the three preceding years. Even assuming that to be a high valuation, yet the share of Henry Boden in the goodwill had a substantial value to the defendants, who must be considered as possible and probable purchasers of it in the market. It was

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worth their while to pay a substantial sum for the sole right to canvass old customers and use the trade name, which is what they would acquire by purchasing Henry Boden's share: *Trego v. Hunt* (1); *In re David & Matthews*. (2)

If that be so, then the value of Henry Boden's share in the goodwill must be included in the account and valued by the Commissioners of Inland Revenue under s. 7 of the Finance Act, 1894.

The defendants contend that Henry Boden's share passed by reason only of a bona fide purchase from Henry Boden "where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit" within the meaning of s. 3, sub-s. 1, of the Finance Act, 1894. That contention raises the question whether the deed of January 30, 1907, and the transaction relating to the goodwill was a matter of business or a matter of bounty: *Fryer v. Morland* (3); *Attorney-General v. Gosling* (4); *Brown v. Attorney-General* (5); *Attorney-General v. Johnson* (6); *Attorney-General v. Holden*. (7) The substance and not the form of the transaction is to be considered: *Leithbridge v. Attorney-General* (8); *Richardson v. Inland Revenue Commissioners*. (9) When the transaction is a partnership deed, the partners being a father and his two sons, and the father's share in the goodwill of the business goes on his death to the two sons without any valuation or payment, the inference is that to that extent at all events the transaction is a donative transfer and not a business transaction.

Danckwerts, K.C., and *Errington*, for the defendants. If it were necessary to consider the question whether Henry Boden's share in the goodwill passed on his death under s. 1 of the Finance Act, 1894, or came within s. 2 and so was deemed to pass under s. 1, the true view would be that it passed under s. 1, and, that being so, s. 2 with its alternative sub-sections need not be considered: *Earl Cowley v. Inland Revenue Commissioners*. (10)

(1) [1896] A. C. 7.

(2) [1899] 1 Ch. 378.

(3) (1876) 3 Ch. D. 675.

(4) [1892] 1 Q. B. 545.

(5) (1898) 79 L. T. 572.

(6) [1903] 1 K. B. 617.

(7) [1903] 1 K. B. 832.

(8) [1907] A. C. 19.

(9) [1909] 2 I. R. 597.

(10) [1899] A. C. 198.

But it is not necessary to consider that question, because, first, this goodwill had no value, and therefore nothing passed or could pass on Henry Boden's death. On that point the evidence is all one way. The goodwill of a business must depend on the particular business: *Trego v. Hunt* (1); *Inland Revenue Commissioners v. Muller & Co.'s Margarine* (2); *Hill v. Fearis*. (3) If Henry Boden had directed his share to be sold, nobody could have been induced to purchase, knowing that the defendants had the right to use the firm name and canvass the old customers.

Secondly, if this share had any value it was amply paid for in money's worth by the covenants of the defendants under the deed of January 30, 1907. This was a purely commercial transaction: *Brown v. Attorney-General*. (4) The fact that the partners were members of one family does not prevent the transaction from being a bona fide purchase for full consideration in money's worth: *Lethbridge v. Attorney-General*. (5) Accordingly, this case falls within s. 3, sub-s. 1, of the Finance Act, 1894, and therefore the property is not subject to estate duty at all. The question whether property passes within the meaning of that sub-section by reason only of a bona fide purchase made for full consideration in money or money's worth is a question for the Court. The question is in effect whether the property in dispute falls within the taxing provisions of the Act, not what its value may be assuming it falls within the Act. The first question to be decided is whether the property falls within the taxing section at all. It is begging this question to argue that the jurisdiction of the Court on the point whether a given case falls within s. 3 is ousted by the jurisdiction of the Commissioners. Their jurisdiction is only to be exercised on property which in the opinion of the Court has passed on the death of the deceased, including the question whether it has passed by reason only of a bona fide purchase made for full consideration in money or money's worth within s. 3.

Thirdly, in view of the fact that the partners always valued this property as a going concern, it follows as a matter of law that

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(1) [1896] A. C. 7.

(3) [1905] 1 Ch. 466.

(2) [1901] A. C. 217.

(4) 79 L. T. 572.

(5) [1907] A. C. 19.

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the value, if any, of the goodwill formed part of the value of the assets generally—*Bell's Trustee v. Bell*(1)—and that Henry Boden's share of the goodwill was included in the 186,734*l.* paid to his executors as his share in those assets.

Sir J. Simon, S.-G., replied.

April 5. HAMILTON J. This is an information by the Attorney-General on behalf of His Majesty claiming a declaration and account with a view to the payment of estate duty in respect of the goodwill in the business of Boden & Co. lately carried on by the defendants H. S. Boden and R. S. Boden with their father, the late Henry Boden, under articles of partnership dated January 30, 1907. Henry Boden died on November 14, 1908, and thereupon by clause 17 of the articles his share was to accrue to the defendants in equal shares, subject only to their paying out to his representatives the value of his share and interest at his death as ascertained by a special general account to be made as on the day of his death, with all proper valuations, but without any valuation of or allowance for goodwill, which goodwill was to accrue to the defendants in equal shares. The account directed by that clause was taken and resulted in a payment by the defendants to the executors of the late Henry Boden (one of whom was the defendant H. S. Boden) of a sum of 186,734*l.* as the value of Henry Boden's share in the partnership assets. That sum has been duly accounted for and estate duty has been paid upon it by his executors.

The case for the Crown is that in these circumstances when Henry Boden died he had in the partnership assets an interest which ceased on his death, and that, to the extent of the value of the goodwill of the partnership business, a benefit accrued or arose to the defendants by the cesser of that interest, which must therefore be deemed *pro tanto* to have passed on his death. Alternatively, it is said that this goodwill, or Henry Boden's interest therein, was property which must on his death have been included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, and by s. 2, sub-s. 1 (c), of the Finance Act,

1894; in other words that by s. 38, sub-s. 2 (c), of the Customs and Inland Revenue Act, 1881, property passed under a settlement or by an instrument not taking effect as a will, whereby an interest in such property for life was reserved expressly or by implication to the settlor.

It is further contended on behalf of the Crown that the case falls within s. 2, sub-s. 1 (d), of the Finance Act, 1894, because in the circumstances the goodwill was an interest provided by the deceased in which a beneficial interest accrued or arose by survivorship or otherwise on the death of the deceased.

The defendants contended that the case falls within s. 1 of the Finance Act, 1894, and that therefore, as explained by Lord Macnaghten in *Earl Cowley v. Commissioners of Inland Revenue* (1), it cannot fall within s. 2 or any of its sub-sections. This is a minor point in the case. In my view to give the expression "interest provided by the deceased" a meaning which would include this goodwill would so extend the operation of s. 2, sub-s. 1 (d), as to make paragraphs (a), (b), and (c) of that sub-section unnecessary.

Then as to the question under s. 2, sub-s. 1 (c), in my view article 17 of the indenture of January 30, 1907, was a contract of sale made at the date of the deed to transfer in futuro, namely, at the death of Henry Boden, his share in the partnership on certain terms therein stated, and his share in the goodwill cannot be called, in the words of s. 38, sub-s. 2 (c), of the Customs and Inland Revenue Act, 1881, "property passing under a settlement made by an instrument whereby an interest in the property for life is reserved to the settlor." The case of *Attorney-General v. Gosling* (2) is distinguishable on the facts.

As to s. 2, sub-s. 1 (b), Henry Boden died entitled to the ordinary interest of a partner in the partnership assets, including the goodwill, if any. He had no separate interest in the goodwill as distinguished from the other assets. He shared in the assets in common with his partners. It is true that for the purpose of liquidating his share of surplus after satisfying liabilities the assets must be regarded as realized at his death, but that is not to say in any true sense that the

(1) [1899] A. C. 198.

(2) [1892] 1 Q. B. 545.

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property of the partnership with the goodwill, if any, passed on his death. In my opinion this case does not fall within s. 1 of the Finance Act, 1894, but does fall within s. 2, sub-s. 1 (b). This goodwill, if any, was property in which the deceased had an interest ceasing on the death of the deceased; and such property to the extent to which a benefit accrues or arises by the cesser of such interest is to be deemed to be that which in fact it is not, namely, property passing on the death of the deceased.

That being so, three questions arise : first, whether there was any goodwill in this business—if there was none there is an end of the case ; secondly, whether, if there was a goodwill, the Crown can claim any further payment in respect of it ; and thirdly, whether to any *prima facie* claim by the Crown the defendants have an answer in whole or in part under s. 3 of the Finance Act, 1894, sub-s. 1 or sub-s. 2, on the ground that the goodwill passed on the death of Henry Boden, the deceased, by reason only of a prior bona fide purchase from him for full or for partial consideration as the case may be. For convenience I will deal first with the contention that the Crown has already had all the estate duty that could be levied upon this property. The Crown contends first that the sum of 186,734*l.* was expressly paid by the defendants to the executors of the deceased as his share of the partnership assets without any allowance for goodwill, and that therefore the defendants cannot be heard to say that any sum of money on which estate duty has been charged was ever paid for goodwill ; secondly, that in point of fact the sum of 186,734*l.* is the value of the deceased's share in the partnership property exclusive of the goodwill ; and thirdly, that even if the 186,734*l.* were proved to exceed the value of the deceased's share, excluding goodwill, by a sum adequate to cover goodwill also, the only result would be that the executors had paid too much duty and were entitled to a repayment *pro tanto*, but there would be no answer to the claim against the defendants, since the duty is payable by those to whom the property passed or is deemed to have passed, and not by the executors to whom it never passed. This contention is conclusive. The executors were not bound to pay duty on the value of the goodwill, because by article 17 they were not

to receive anything in respect of goodwill ; if they have by mistake paid duty on the value of the goodwill they are entitled to repayment. The fact that the wrong person has paid the duty and can claim it back is certainly no reason why the person who owes it should not pay it.

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This makes it unnecessary to consider whether in fact the sum of 186,734*l.* represented the value of the deceased's share exclusive of goodwill, but I may say that upon the evidence I am not satisfied that any portion of that sum is so clearly in excess of the matters to which it was attributed in the valuation as to constitute it an overpayment, some part of which might go towards a payment in respect of goodwill. No account was taken of goodwill in the valuation, and I do not think that there was inadvertently included in the sum paid to the executors any sum which could be said to be the price of the goodwill. It was contended on the analogy of *Bell's Trustee v. Bell* (1) that the method adopted in valuing the assets precluded any separate or measurable value from being attributed or attributable to goodwill, and that therefore, as a conclusion partly of law and partly of fact, I must take the sum of 186,734*l.* to be a payment for the assets including goodwill. The method adopted was, as described by the defendant H. S. Boden, a rough and ready method. He was the only partner called and the only witness who knows of his own knowledge how these valuations and accounts were taken. He is positive that there never was and that nobody ever thought there was any goodwill, and that no value was ever attributed to goodwill in any transaction or for any purpose. In valuing the assets the partners took them at cost price, adding round sums rather less than the actual cost for additions and improvements and deducting other sums for depreciation when they thought their machinery had aged and required it. I must take it in the absence of contradictory evidence that this machinery did not require that periodic and certain writing down, which I should have thought moving machinery did always require. The decision of *Bell's Trustee v. Bell* (1) is useful as shewing what the practical results may be of valuing a business as a going

(1) 12 R. 85.

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concern, but it does not carry the defendants so far as to warrant them in saying that there can be no pecuniary value in the goodwill, if any, outside and beyond the 186,734*l.*, estimated as that sum was. The case turned on an entirely different point. It is to be observed, however, that this valuation, if it could have been imposed upon a purchaser of a share in this business, would have been extremely favourable to the vendor.

I come next to the question, was there a goodwill in this business? The defendant H. S. Boden said that he had examined the documents of the business as far back as 1860 without finding such a thing as goodwill either in fact or in name. In 1877 Henry Boden, the deceased, began to carry it on with his brother, Walter Boden, as his sole partner, they having previously carried it on with certain other persons named Smith. In 1893 they took into partnership the present defendant H. S. Boden by articles of partnership dated May 16, 1893. The share of the principal partner was estimated at above 186,000*l.* For seven years before his death the average trading profits had been 40,000*l.* a year. There were several factories in Derbyshire, particularly one at Derby; there was also a factory at Chard in Somersetshire. One would have thought that a firm like this, manufacturing plain net which is in large demand, would not have been destitute of goodwill, but must have had some advantage over a newly-starting competitor although equipped with equally good factories, machines, and managers. Nevertheless all the evidence of those who understand and are acquainted with this business, partners, managers, and customers, is that there is in it no goodwill whatever. The Crown has called no witness. The Solicitor-General relied on s. 7, sub-s. 5, of the Finance Act, 1894, which enacts that "the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." But none the less, and without prejudice to the right to have the value of the property ascertained by the Commissioners, the Crown might have tendered expert evidence, if it had been forthcoming, that such a business would contain some goodwill. No such evidence

has been called. The Solicitor-General has contented himself with the suggestion that if a firm makes an annual profit of 40,000*l.* the Court can by taking several years' purchase arrive at something which may be called the value of the goodwill. The question whether there was a goodwill or not is said to be a matter of mixed law and fact; I should have thought it was a pure matter of fact; and I am impressed by the circumstance that all those who know the business assert, with confidence in proportion to their knowledge, that there was no goodwill. Plain net is a fabric principally used by lace manufacturers as the foundation for other work. It is graded by the width of the machines and by the size of the spaces in the network. The finished product of one manufacturer is so like that of another that it is impossible to distinguish between them. The names of the manufacturers are not known to retail dealers and still less to the public. It is a fact, although not conclusive, that Boden & Co. never advertise. They canvass a small market, now principally at Nottingham since German manufacturers have learnt to supply their own markets. They have no trade mark, sign, badge, or patent; any patents for machinery that there may be have been treated as of no account. One machine is practically as good as another, and the product is so uniform that any one who can buy the machinery can produce the fabric. Its sale depends almost entirely on the price. The oldest established producer in competition with less known firms may have some slight advantage in that his experience may save him from faulty work of which purchasers from time to time complain. Still in substance the profit comes from judicious buying of raw material and fuel, from the management of work-people and keeping down of prime cost, matters of personal skill, energy, experience, and judgment. The business is largely personal, like that of a portrait painter or of a speculator in various stocks which his individual skill enables him to select. The Solicitor-General pointed out that the word "goodwill" is to be found in article 17 of the deed of 1893 and in articles 17 and 18 of the deed of 1907 and in all the phases of that instrument from the earliest draft to the final engrossment, and asked why this was so if there was no goodwill. The answer is that it was

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thought right, as a matter of draftsmanship, to provide that on the death of one of the partners the goodwill, if any, should accrue to the survivors, and, as a matter of business, to express what was intended, that no allowance or valuation was to be made in respect of it. The provision in clause 18 was designed to meet the emergency of either of the sons dying in the lifetime of the father without having realized enough to support a wife and family. The evidence as a whole leads me to the conclusion that the goodwill of this business was of very little value.

But there was evidence that such a business as this, if all the partners covenanted not to carry on a competing business, might possess a goodwill of real existence and some value such as a purchaser would be prepared to acknowledge; and I have come to the conclusion that, with such a covenant, this business would have a goodwill of practical value. How does that affect the present case? In this way. If Henry Boden's interest in the goodwill, such as it is, of this business, instead of accruing as it did under the partnership deed to the two surviving partners, had passed to his legal personal representatives, could it have been made an asset of any practical value? I think it could have been made of some small value if, but only if, it were acquired by the two surviving partners. As long as it was outstanding it was a thing of little or no value because it could only be sold subject to the free competition of the surviving partners.

•But it was pointed out by the Solicitor-General that the surviving partners must be included as possible purchasers of this outstanding interest, and that it would have been of some value to them, since, having acquired it, they, and they only, would be the persons whose covenant not to compete would be necessary and sufficient to make the goodwill an item which a purchaser might really take into account. To this limited extent I think there was a goodwill, but I am satisfied that from a practical point of view it was worth extremely little.

That brings me to the third and last point. The defendants contended, under s. 3 of the Act, that the property within the meaning of s. 2, which passed on the death of the deceased, passed only by reason of a bona fide purchase by the defendants from their father for full consideration in money or money's

worth. Whether the consideration for this property was full or not is a question of fact. I think that this is a question for the Court. It is not right to contend, as was suggested, that the effect of s. 7, sub-s. 5, is to prevent the Court from adjudicating upon that question until the principal value of the property has been estimated by the Commissioners. Where an issue arises upon the proceedings before the Court the jurisdiction of the Court to dispose of that issue can only be ousted by plain words, and s. 7, sub-s. 5, has in my view no such effect. Under s. 3, sub-s. 2, there has to be taken into account not only the value of the property, but also the value of the consideration, which may be allowed as a deduction from it; and I do not see that the Commissioners have any jurisdiction to ascertain the value of the consideration. Furthermore, the question whether full consideration was given or not may no doubt be solved by putting a value on the property which passed on the one side, and weighing against it the money value of the obligations assumed on the other; but that is not the only method of solving the question. Another method is by looking at the nature of the transaction and considering whether what is given is a fair equivalent for what is received; and that is the way in which the question should be approached in this case. In my opinion the first three sections of the Act prescribe the conditions of a liability for estate duty. The subsequent sections provide machinery for working out the intention of those enactments. It is for the Court to determine whether there is any liability and whether liability under s. 1 or s. 2 is met by the answer provided by s. 3.

I am satisfied that the purchase contained in the partnership articles of 1907 was perfectly bona fide. The real character of this transaction, rather than its good faith, has been impugned. Henry Boden having declared that on his death his share in the business was to be sold to his sons, but that they were not to pay anything for goodwill, it is said that as to the goodwill, this transaction was not a sale but a gift. I do not agree. A father intending to make a gift to his sons would do it otherwise than by a parenthetical clause like this in clause 17. Moreover the corresponding clause 17 in the deed of 1893 contained the same provision, but no one would suggest that

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Walter Boden intended thereby to make a gift to his brother's sons and to disinherit his own. Mr. Danckwerts argued that on proof of intention to give, or of the fact of giving, full consideration, the matter was concluded, as it was not the design of the Legislature to reopen in the light of after events dealings which the parties at the time regarded as purely commercial. That contention is not wholly sound. The fact that the parties to the transaction, knowing more of the business than anybody else, always believed and believe now that they respectively gave and received full consideration is strong evidence that they did so in fact. But the Act does not say that estate duty shall not be payable by reason only of a bona fide purchase "intended" or "believed to be for full consideration paid by the vendor"; it says simply "for full consideration paid by the vendor." It was agreed on both sides that, for the purpose of measuring whether full consideration was paid or not, one must look at the state of affairs at the time of the contract. The mutual promises themselves, not their result or realization, form the subject-matter of the inquiry.

The Crown contends that the very fact that the defendants never believed in the existence of this goodwill shews that they never gave or intended to give full or any consideration for it. That is more a verbal than a substantial criticism. The articles of partnership of 1907 fall within the words of the test suggested in the case of *Brown v. Attorney-General* (1), affirming *Attorney-General v. Brown* (2), which is in point in the present case although it was a decision upon the Succession Duty Act, 1853, and not upon the Finance Act, 1894. Looking at the substance of this transaction as well as at the form I think that it was a sale and purchase to take effect upon the death of the senior partner. The contract was one and indivisible; its terms are not to be examined each by itself alone, but the combined effect of all must be regarded. Looked at as a whole and also in each of its stipulations, it may fairly be considered as merely a partnership deed regulating the contractual relations between the parties and not as in part a settlement making provision for children. The blood relationship may be eliminated from the

(1) 79 L. T. 572.

(2) (1897) 77 L. T. 591.

case. If Henry Boden had died or had been paid out and Walter Boden had been party to the deed of 1907 instead, it would in my opinion have been a very reasonable and natural bargain for him to have made. As the matter stood Henry Boden might have lived for twenty years after the execution of the deed; during that time he would not be bound to give more time or attention to the business than he chose, whereas both his sons, one at Chard and one at Derby, were bound to give all the time and attention to it that the proper conduct of the business required, and in addition they were not to carry on or engage in any other business whatsoever. The shares in the profits were just and fair shares, taking into account the burdens which Henry Boden took upon himself with regard to the employees Richardson and Nelson. I attach very small importance to the fact that Walter Boden's share was to be paid off at upwards of 50,000*l.*, and that by clause 8 of the deed of 1907 the assets of the business of Boden & Co. were to be subject to the payment thereof of the then existing liabilities, including this liability to the executors of Walter Boden. Having regard to the facts, first, that the partnership was to last as long as Henry Boden lived, whether he was compos mentis or not—if any two of the partners should so long live, and for the further period of two years after his death if the two sons survived him; secondly, that he was to have his capital employed as long as he lived in this lucrative business, where the profits were earned by the efforts of his two sons, he not being bound to give any more attention to the business than he chose, while he had the absolute control and right of final decision in case there was any difference of opinion among the partners as to its management; and thirdly, that the goodwill, of which they thought little, was to pass with the rest of the corpus of his interest to them on payment of a price which was liberal to himself, I think that Henry Boden and his sons were justified in believing, as I am satisfied they did believe, that full consideration was being given, in the shape of their covenants to serve and their other covenants, for any property which accrued to them on his death otherwise than by payment in cash. In my opinion therefore the defendants have made out their defence under s. 3

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of the Act. The property in question passed by reason only of this purchase which was a bona fide purchase for full consideration in money or money's worth, money for the tangible assets and money's worth for the goodwill, paid to the vendor for his own use or benefit and in fact enjoyed by him in his lifetime. The result is that there will be judgment for the defendants.

Judgment for defendants.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for defendants: *Bartlett & Gregory, for Bartlett & Sons, Sherborne.*

NOTE.—Finance Act, 1894 (57 & 58 Vict. c. 30):—

Sect. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned"

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:"

"(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

"(c) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom; and

"(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Sect. 3: "(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit"

Sect. 7: ". . . . (5.) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such

property would fetch if sold in the open market at the time of the death of the deceased;”

“(7.) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall:—

“(a) If the interest extended to the whole income of the property, be the principal value of that property; and

“(b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended.”

Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12):—

Sect. 38: “(1.) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

“(2.) The personal or moveable property to be included in an account, shall be property of the following descriptions, viz.:—

“(c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.”

Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7):—

Sect. 11: “(1.) Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—

“The description of property marked (c) shall be construed as if the expression ‘voluntary settlement’ included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression ‘such property,’ wherever the same occurs, included the proceeds of sale thereof.”

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[IN THE COURT OF APPEAL.]

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THE KING *v.* JUSTICES OF WILTSHIRE.*Ex parte* JAY.

Practice — Appeal — “Criminal cause or matter” — Summary Conviction — Notice of Appeal to Quarter Sessions — Appeal not prosecuted — Order for Costs — Certiorari — Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), ss. 5, 6 — Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6, 47 — Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.

Where, notice of appeal to quarter sessions against a summary conviction having been given, but the appeal not being prosecuted, the sessions had made an order for payment of costs against the party who had given the notice under s. 6 of the Quarter Sessions Act, 1849, and an application for a certiorari to bring up the order so made had been refused by a Divisional Court :—

Held, that, the order for costs being one made in a “criminal cause or matter,” no appeal lay to the Court of Appeal against the decision of the Divisional Court.

ARGUMENT on order nisi for a certiorari to bring up an order of quarter sessions for the county of Wilts with a view to its being quashed.

The order in question was as follows :—

“It is ordered as follows, that is to say :—In the matter of a notice of appeal given by Harvey Brownrigg Jay, which appeal was not prosecuted, Whereas at a Court of summary jurisdiction sitting at Wootton Bassett in the petty sessional division of Cricklade in the county of Wilts on the 8th day of April 1911 Harvey Brownrigg Jay was by two justices convicted for that he on the 26th day of January 1911 at the parish of Cricklade in the county aforesaid did unlawfully and wilfully commit damage injury and spoil to and upon a gate there the property of the Great Western Railway Company thereby then doing injury to the said property to the amount not exceeding 5*l.*, contrary to the statute 24 & 25 Vict. c. 97, s. 52, And it was there and then adjudged that the said H. B. Jay for his said offence do forfeit and pay to the clerk of the said Court of summary jurisdiction the sum of 1*s.* and do also pay to the informant the sum of 1*l.* 0*s.* 9*d.* for compensation and the sum of 1*l.* 5*s.* for costs forthwith, And in

default of payment it was adjudged that the said H. B. Jay be imprisoned in H. M.'s prison at Devizes and there kept to hard labour for the space of 7 days unless the said sums and all costs and charges of the said commitment and of his conveyance to the said prison be sooner paid, And whereas by a notice in writing under his hand and under the hand of Charles E. Lacy his solicitor and addressed to the justices of the peace for the petty sessional division of Cricklade in the county aforesaid to Harry Bevir their clerk and to the Great Western Railway Company and to their solicitors Messrs. Kinneir & Co. of Swindon, which said notice in writing was delivered to the said Messrs. Kinneir & Co. on the 20th day of the month of April aforesaid, the said H. B. Jay did give notice that he intended at the then next General Quarter Sessions of the peace to be holden in and for the county of Wilts to appeal against the hereinbefore recited order made against him on the said 8th day April as aforesaid, And whereas at the present quarter sessions being the sessions next after the delivery of the notice hereinbefore recited the said H. B. Jay has not in pursuance of the said notice entered or prosecuted an appeal or made any appearance, Now, on proof of the delivery of the notice hereinbefore recited to the party entitled to receive the same and on hearing Mr. Ratcliffe Cousins and Mr. Thornton Lawes of counsel for and on behalf of the said party, This Court doth in pursuance of the provisions of an Act of Parliament passed in the 13th year of the reign of Her late Majesty Queen Victoria chapter 45 and in exercise of every and any other power them enabling in this behalf order that the said H. B. Jay being the party giving such notice as aforesaid do within 21 days after the service on him of this Order pay to the clerk of the peace of this county being the clerk of this Court the sum of 28*l.* 12*s.* 1*d.* being the amount of the costs and charges incurred in consequence of the delivery of the notice hereinbefore recited to the party entitled to receive such notice, to be by the said clerk of the peace paid over to the party entitled to receive the same."

Application was made on behalf of the above-mentioned H. B. Jay to a Divisional Court for an order nisi for a certiorari to bring up the above-mentioned order of the quarter sessions with a view

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C. A. 1912 <hr/> REX v. WILTSHIRE JUSTICES. JAY, <i>Ex parte.</i>	to its being quashed on the ground that the notice of appeal against the conviction was not properly served on the Great Western Railway Company, as Messrs. Kinneir & Co. were not their agents for the purpose of receiving such a notice, and was therefore a nullity. The Divisional Court (Hamilton J. and Bankes J.) refused the application. Application for an order nisi was then made to the Court of Appeal, who granted the application. (1)
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Holman Gregory, K.C. (J. R. Cousins with him), for the Great Western Railway Company, shewed cause against the order for a certiorari being made absolute. This is clearly an appeal in a criminal matter, and therefore is forbidden by s. 47 of the Judicature Act, 1873. In *Ex parte Woodhall* (2) Lord Esher M.R. said that "the result of all the decided cases is to shew that the words 'criminal cause or matter' in s. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes and matters I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." [He also cited *Reg. v. Steel* (3); *Reg. v. Fletcher*. (4)]

Rawlinson, K.C. (Firminger with him), for H. B. Jay, in support of the order for a certiorari. The order made by the quarter sessions in this case was not made in a criminal matter. It was not made in an appeal against the conviction. No such appeal was entered or prosecuted. The order was made under s. 6 of

(1) On the application to the Court of Appeal for an order nisi, it was contended that the defect in the service of the notice of appeal appeared on the face of the order of the quarter sessions, and, that Court being a Court of record, this constituted error on the record, and, where there was error on the record, an appeal lay to the Court of Appeal in a

criminal matter, and *Darlow v. Shuttleworth* [1902] 1 K. B. 721, was cited. The point that the defect appeared on the face of the order was, however, given up on the argument of the order nisi.

(2) (1888) 20 Q. B. 832.

(3) (1876) 2 Q. B. D. 37.

(4) (1876) 2 Q. B. D. 43.

the Quarter Sessions Act, 1849 (1), and was simply an order for payment of costs occasioned by the giving of the notice of appeal. Costs so ordered to be paid were by s. 6 made recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by the Summary Jurisdiction Act, 1848. (2)

Sect. 55, sub-s. 2, of the Summary Jurisdiction Act, 1879, repeals "so much of any other Act as is inconsistent with this Act." It is contended that the latter part of s. 6 of the Quarter Sessions Act, 1849, is impliedly repealed by ss. 6, 47, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and that these costs are now recoverable as "a civil debt" by virtue of those sections. By s. 27 of the Summary Jurisdiction Act, 1848, if costs ordered to be paid on an appeal against a summary conviction were not paid, a magistrate could issue a warrant of distress upon a certificate from the clerk of the peace that they were not paid without any information or complaint. Now, application could be made without any information or complaint to a magistrate to enforce the order for costs by issuing a distress warrant under s. 47 of the Summary Jurisdiction Act, 1879, "as for a civil debt."

[FARWELL L.J. If, the appeal having been prosecuted, the sessions had dismissed it, and ordered the appellant to pay the costs, under s. 5 of the Quarter Sessions Act, 1849, would not that order for costs have been made in a criminal matter? Reading ss. 5 and 6 together, it looks very much as if the effect of s. 6 was to provide that, if the appeal is not prosecuted after notice of appeal has been given, the sessions shall have the same power to give costs as they would have had against an appellant under s. 5.]

The cases are not the same under the two sections. Under s. 6 the order for costs is not made in an appeal against the conviction. The proceeding under s. 6 is an independent proceeding of a civil nature to indemnify the party who has been put to expense by reason of the notice of appeal. [He cited *Reg. v. Kerswill*. (3)]

(1) Commonly called Baines's Act. (2) Commonly called Jervis's Act.

(3) [1895] 1 Q. B. 1.

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VAUGHAN WILLIAMS L.J. We think that the preliminary objection to this appeal must prevail. Upon looking at the material sections of the Quarter Sessions Act, 1849, it appears to me that there can be no doubt as to their effect. Sect. 5 of that Act provides that "upon any appeal to any Court of general or quarter sessions of the peace the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by" the Summary Jurisdiction Act, 1848. That section applies only to cases where the appeal has been heard. Then by s. 6 of the same Act it is provided that "for the more effectual prevention of frivolous appeals . . . any Court of general or quarter sessions of the peace, upon proof of notice of any appeal to the same Court having been given to the party or parties entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it so think fit, at the same sessions for which such notice was given, order to the party or parties receiving the same such costs and charges as by the said Court shall be thought reasonable and just to be paid by the party or parties giving such notice, such costs to be recoverable in the manner last aforesaid." Therefore, so far as that Act is concerned, there is no doubt that the Court of quarter sessions has power to make an order for costs, though the appeal has not been heard. In this case no one can dispute that the matter before the quarter sessions in respect of which their order was made had its origin in a criminal matter. That being so, it is sought to make out that this is not a criminal matter by reason of the provisions of the Summary Jurisdiction Act, 1879. Sect. 6 of that Act provides that "where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a Court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and, if recovered before a Court of summary jurisdiction, shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under

this Act, and not otherwise; and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt, and not otherwise." It appears to me that this section refers to a wholly different kind of procedure from that in question here. This does not appear to me to be a case in which it was attempted to recover a sum of money claimed to be due on complaint. It was a case in which there was a prosecution and conviction for doing wilful damage to property, and the proceeding in question was initiated by that prosecution and conviction. It appears to me that s. 6 of the Summary Jurisdiction Act, 1879, has no bearing on the question with which we have to deal. We were then referred to s. 47 of the Summary Jurisdiction Act, 1879, which provides that "the provisions of this Act with respect to a sum adjudged to be paid by an order shall apply, so far as circumstances admit, to a sum in respect of which a Court of summary jurisdiction can issue a warrant of distress without an information or complaint under the Summary Jurisdiction Act, 1848, in like manner as if the said sum were a civil debt." I do not think that this section has any application to the present question for the same reason as I have already given with regard to s. 6. The truth is that from first to last the proceeding in which the order here in question was made was nothing but a criminal proceeding; and, that being so, the clause of s. 47 of the Judicature Act, 1873, which provides that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for error of law apparent upon the record" is applicable here. I need not refer at length to the words of Lord Esher in *Ex parte Woodhall* (1) to the effect that the words "criminal cause or matter" in that section should receive the widest interpretation, or to the other cases which have been cited. For these reasons it appears to me that the objection taken to the issuing of a writ of certiorari in this case is good, and that none of the matters which have been relied upon by the counsel for the appellant can avail him in the case of a proceeding before quarter sessions which had its origin in a matter of a

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(1) 20 Q. B. D. 832.

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FARWELL L.J. I agree. In my judgment ss. 5 and 6 of the Quarter Sessions Act, 1849, must be read together, s. 6 being in the nature of a supplement to s. 5. It was admitted by the counsel for the appellant that, if the appeal had been heard and dismissed, and an order for costs made against the appellant under s. 5, that order would have been made "in a criminal cause or matter." As I read s. 6, it was intended to enable the quarter sessions to deal with the costs in cases where a notice of appeal has been given, but the appeal has not been prosecuted, in the same way as if the appeal had been heard and dismissed. I do not think that it was, as suggested by counsel, intended to enable a new and independent proceeding to be initiated so as to bring in the provisions of the Summary Jurisdiction Act, 1879, on which reliance has been placed.

KENNEDY L.J. I am of the same opinion. The sole matter which we have to decide in dealing with the question of jurisdiction is whether this is an appeal against a decision "in a criminal cause or matter." When one looks at the order of the sessions, it appears to be one made in reference to the non-prosecution of an appeal of which notice had been given from a conviction on criminal proceedings before justices in petty sessions. The matter must be either criminal or civil. I do not see how there can be anything intermediate. There may be some cases as to which it may be difficult to say upon which side of the line they fall, but, in the case here in question, the matter which was the subject of the proceedings before the magistrates in petty sessions was undoubtedly criminal. If the question were asked of any one whether this order was made in a criminal or a civil matter, I do not myself see how any answer could be given except that it was made in a criminal matter. The counsel for the appellant asked us to consider the method by which the order would be enforced; he said that, if we turned from the earlier legislation in the Acts of 1848 and 1849 to the Summary Jurisdiction Act, 1879, we should find by virtue

of that Act the order was one which could be enforced only by the process applicable under that Act to a civil debt. I express no opinion whether that proposition is correct. I am not at present satisfied that it is so, but I will assume it to be so. I cannot, however, see that the order would be any the less made in a criminal matter because the mode of enforcing it is by process applicable to a civil debt. The argument of the appellant's counsel seems to me to be of no effect, even if the assumption on which it is based be granted. The question is whether the order appealed against is an order made in a criminal matter; and with this the answer to the question how the order for the payment of the costs is to be enforced does not appear to me to have any material connection. It was said in *Ex parte Woodhall* (1) that the widest interpretation should be given to the words "criminal cause or matter" in s. 47 of the Judicature Act, 1873. In my judgment on no interpretation of those words could any other view properly be taken than that justices acting under s. 6 of the Act of 1849, which supplements s. 5, in the case of a notice of appeal against a conviction, were making an order in a criminal cause or matter.

Order discharged.

Solicitor for appellant: *C. E. Lacy.*

Solicitor for respondents: *L. B. Page, for Kinneir & Co., Swindon.*

(1) 20 Q. B. D. 832.

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Feb. 14, 22.

SHIPTON, ANDERSON & CO. v. WEIL BROTHERS & CO.

Sale of Goods—Delivery—Delivery of Larger Quantity than contracted to be sold—Trifling Excess—Right of Buyer to reject the Whole—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30, sub-s. 2.

Under a contract for the sale of a cargo of wheat weighing 10 per cent. more or less than 4500 tons, the sellers tendered a cargo weighing 55 lbs. more than the maximum quantity of 4950 tons. The sum payable for the 55 lbs. at the contract price would have been about 4s., but the sellers never claimed payment thereof. The buyers rejected the whole cargo solely upon the ground that the quantity tendered was 55 lbs. in excess of the contract quantity:—

Held, that, as the quantity in excess was so trifling and the sellers had not claimed the price thereof, the sellers had substantially performed the contract, and the buyers were not entitled to reject the cargo under s. 30, sub-s. 2, of the Sale of Goods Act, 1893, which provides that, “where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer . . . may reject the whole.”

AWARD of arbitrators stated in the form of a special case for the opinion of the Court.

The plaintiffs, under a written contract, sold to the defendants a cargo of wheat, “weight as per bill or bills of lading . . . say 4500 tons, 2 per cent. more or less; seller has the option of shipping a further 8 per cent. more or less on contract quantity.” In intended performance of that contract the plaintiffs tendered to the defendants a cargo of wheat which weighed 55 lbs. more than 4950 tons, the maximum number of tons which the plaintiffs were entitled to deliver under the contract. The defendants rejected the tender solely upon the ground that the quantity of cargo tendered was 55 lbs. in excess of the contract quantity. The price payable for the 55 lbs. would have been about 4s., the whole contract price being more than 40,000*l.* for 4950 tons; but the plaintiffs never claimed payment of the 4s.

The plaintiffs sold the cargo rejected by the defendants at a loss of 3290*l.* and claimed that sum as damages. The dispute between the parties was referred to arbitration under an arbitration clause contained in the contract. The arbitrators stated their

award in the form of a special case for the opinion of the Court, the questions being (1.) whether upon the true construction of the contract the sellers were entitled to calculate the "further 8 per cent. more or less" on 4590 tons or on 4500; (2.) whether, if the sellers were only entitled to calculate the 8 per cent. on 4500, the excess tendered was so trifling as not to amount to a breach of the contract. (1)

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Bailhache, K.C., and *B. A. Cohen*, for the plaintiffs. If the true construction of the contract is that the "8 per cent. more or less" is to be calculated upon 4500 tons and not upon 4590 tons, then the excess of 55 lbs. in the quantity tendered is so trifling that it cannot be treated as a breach of the contract by the plaintiffs so as to give the defendants a right to reject the whole cargo under s. 30, sub-s. 2, of the Sale of Goods Act, 1893.

Maurice Hill, K.C., and *Leck*, for the defendants. This is a business contract and it provides that the only variation from the named quantity of 4500 shall be 2 per cent. and a further 8 per cent. No variation beyond those limits fixed by the contract can be allowed. The fact that the variation in this case is very small is immaterial; there is a breach of contract because the extreme limits of variation permitted by the contract have been exceeded: *Tamvaco v. Lucas*. (2) The Sale of Goods Act, 1893, is intended to be a code of the law relating to the sale of goods, and the proper mode of construing s. 30, sub-s. 2, is to examine its language and see what is its natural meaning: *Bank of England v. Vagliano* (3); and "a quantity larger than he contracted to sell," in its natural meaning, means any excess however small. A contract of sale must be construed according to the plain ordinary sense of the words used: *Bowes v. Shand*. (4)

B. A. Cohen replied.

Cur. adv. vult.

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30, sub-s. 2: "Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in

the contract and reject the rest, or he may reject the whole."

(2) (1859) 1 E. & E. 581.

(3) [1891] A. C. 107, 144.

(4) (1877) 2 App. Cas. 455.

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Feb. 22. LUSH J., having first decided that, upon the true construction of the contract, the plaintiffs were only entitled to deliver 4950 tons, proceeded: The second question is whether, if the plaintiffs were only entitled to calculate the 8 per cent. on the 4500 tons, which is in my view the true position, the excess in fact tendered was so trifling as not to amount to a breach of the contract. Now the excess quantity is trifling, so trifling that it is quite impossible to suppose that any business man would regard it as in any way affecting the substance of the contract or as making the contract any the more or any the less an advantageous contract to enter into. It is an excess of 55 lbs. in a total cargo of 4950 tons; approximately it is an excess of 1 lb. in every 100 tons tendered. If one considers the excess in money, it seems more trifling still; it is an excess of 4s. on a contract price of over 40,000*l.*; or putting it again in still plainer figures an excess of 1s. in 10,000*l.* Counsel for the defendants, however, say that that is an excess which by law entitles the buyer to reject, and they rely upon s. 30, sub-s. 2, of the Sale of Goods Act of 1893. That section says: [His Lordship read the subsection.] They contend, as they must to be consistent, that any excess that can be measured in weight or in currency would have this effect, that, if it is only sixpence or indeed anything that can be measured, there is a discrepancy between the contract and the tender which is fatal. I asked if there was any authority for such a contention, and I was referred to the case of *Tamvaco v. Lucas*.⁽¹⁾ The difference between the contract quantity and the shipped quantity was, no doubt, not very large in that case, and it was undoubtedly held that the tender was a bad tender because there had been an excess; but I would point out that, as far as I can gather from the arguments and from the judgment, the question was not raised which is raised in this case, whether there can be an excess so trivial that it is not in substance an excess at all. That case was dealt with on the footing that there had been in fact an excessive tender, and the question was whether in the circumstances of that case the buyer could or could not reject. I do not think that that case can be relied upon as an authority for the proposition that any excess, if

(1) 1 E. & E. 581.

once it can be measured and put into pounds, shillings, and pence, or put into weight, is of itself necessarily in law an excess which makes the tender bad. I have found a case which I think is more in point. It is true that the actual point was not decided, because it was not necessary to decide it; but there was a dictum of Bigham J. in that case which exactly, in my opinion, applies to this case. The case to which I refer is *Harland v. Burstall*. (1) A smaller quantity was there delivered than the contract quantity, thirty loads out of 500, of course a very different proportion to this, and Bigham J. held that there was a deficiency which entitled the buyers to reject. The learned judge says this: "Of course, in carrying out a commercial contract such as this, some slight elasticity is unavoidable; no one supposes that the delivery is to be within a cubic foot of the named quantity, but it must be substantially of the quantity named; and in my judgment 470 loads is not substantially 500." I think that the question is whether there has been a substantial departure from the contract. As I pointed out during the argument, the right to reject is founded upon the hypothesis that the seller was not ready and willing to perform, or had not performed, his part of the contract. The tender of a wrong quantity evidences an unreadiness and unwillingness, but that, in my opinion, must mean an excess or deficiency in quantity which is capable of influencing the mind of the buyer. In my opinion, this excess is not. I agree that directly the excess becomes a matter of possible discussion between reasonable parties, the seller is bound to justify what he has done under the contract; but the doctrine of de minimis cannot, I think, be excluded merely because the statute refers to the tender of a smaller or larger quantity than the contract quantity as entitling a buyer to reject.

I wish to add this. The reason why an excess in tender entitles a buyer to reject is that the seller seeks to impose a burden on the buyer which he is not entitled to impose. That burden is the payment of money not agreed to be paid. It is prima facie no burden on the buyer to have 55 lbs. more than 4,950 tons offered to him, and there is nothing to suggest that these sellers would have ever insisted, or thought of insisting,

(1) (1901) 6 Com. Cas. 113, 116.

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upon payment of the 4s. over the 40,000*l.* The sellers' original appropriation appeared to be within the proper quantity. The excess of 55 lbs. appears when the quantity shipped is converted from kilos into tons. If the sellers had expressly or impliedly insisted upon payment of the 4s. upon their view of the contract, the case would have been different; but nothing of that kind can be supposed to have taken place here.

For these reasons I think that the second question must be answered in the affirmative, and the award must be that the defendants pay 3290*l.* to the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Simpson, Cullingford, Partington & Holland.*

Solicitors for defendants: *Thomas Cooper & Co.*

J. H. W.

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Jan. 16, 17.

MONRO *v.* THE CENTRAL CREAMERY COMPANY,
 LIMITED.

Adulteration—Butter—Milk Powder—Sample for Analysis—Notification of Intention to have Analysis—Division of Sample into Parts—Limit of Time for Proceedings—"Person purchasing any article"—"Article purchased for test purposes"—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63)—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19—Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), ss. 2, 3.

By s. 2 of the Butter and Margarine Act, 1907, the public officers therein specified are empowered to enter premises registered as therein mentioned and to take samples for analysis of any butter or of any article capable of being used in the manufacture, treatment, or adulteration thereof.

By s. 3, if any substance intended to be used for the adulteration of butter is found in any butter factory the occupier of the factory shall be guilty of an offence under the Act.

By s. 11, the Margarine Act, 1887, s. 12, embodying ss. 12 to 28 of the Sale of Food and Drugs Act, 1875, is to apply to all proceedings under the Act.

By s. 14, the Act is to be construed as one with the Sale of Food and Drugs Act, 1899.

By s. 14 of the Sale of Food and Drugs Act, 1875, as amended by

s. 27 of the Sale of Food and Drugs Act, 1899, the person purchasing any article with the intention of submitting the same to analysis shall notify to the seller his intention to have the same analysed and shall divide the article into three parts and further proceed as therein directed.

By s. 19 of the Sale of Food and Drugs Act, 1899, where any article of food has been purchased for test purposes any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof shall not be instituted after the expiration of twenty-eight days from the time of the purchase :—

Held, that it is not necessary to observe the formalities prescribed by s. 14 of the Act of 1875, on the taking of a sample under s. 2 of the Act of 1907, and that the observance of those formalities is not a condition precedent to proceedings under s. 3 of that Act.

Held, also, that proceedings under that section are not subject to the limit of time prescribed by s. 19 of the Act of 1899.

Rouch v. Hall (1880) 6 Q. B. D. 17, applied.

CASE stated by a metropolitan magistrate.

The appellant was an inspector of the Board of Agriculture and Fisheries.

The respondents were a limited liability company and the occupiers of a certain butter factory in Waterloo Road, London, S.E. They were summoned to answer an information preferred against them on March 21, 1911, by the appellant charging them with an offence under s. 3 of the Butter and Margarine Act, 1907 (1), in that a substance, to wit, milk powder, intended

(1) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 2 :
“(1.) Any officer of the Board of Agriculture and Fisheries or of the Local Government Board shall have power to enter at all reasonable times any premises registered under the Sale of Food and Drugs Acts or this Act, and to inspect any process of manufacture, blending, reworking, or treatment used therein, and to take samples for analysis of any butter, margarine, margarine cheese, milk-blended butter, or of any article capable of being used in the manufacture, treatment, or adulteration of any such article as aforesaid.”

Sect. 3: “If any substance in-

tended to be used for the adulteration of butter is found in any butter factory, the occupier of the factory shall be guilty of an offence under this Act, and if any oil or fat capable of being so used is found it shall be deemed to be intended to be so used, unless the contrary is proved.”

Sect. 11: “(1.) Any person guilty of an offence under this Act shall be liable on conviction under the Summary Jurisdiction Acts for a first offence to a fine not exceeding twenty pounds

“(2.) Section five of the Margarine Act, 1887, and section twelve of the same Act (which relates to proceedings under that Act), shall

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to be used for the adulteration of butter was found in their butter factory.

On December 6, 1910, the appellant and one Nigel William Montagu Brunton, another inspector of the Board of Agriculture and Fisheries, together visited the respondents' premises.

On the premises they saw a barrel about three parts full of a certain powder described to them by servants of the respondents as milk powder.

The inspectors took samples of the powder out of the barrel and filled two bottles with those samples. They then went to another part of the premises and there saw a substance having the appearance of butter, from which they, with the assent of the servants of the respondents, took a sample and filled two bottles therewith. The inspectors then left the factory, taking with them the samples of powder and butter obtained as aforesaid,

apply to proceedings under this Act, with the substitution of references to this Act for references to the Margarine Act, 1887."

Sect. 14: "This Act . . . shall be construed as one with the Sale of Food and Drugs Act, 1899, . . ."

Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 12: "All proceedings under this Act shall, save as expressly varied by this Act, be the same as prescribed by sections twelve to twenty-eight inclusive of the Sale of Food and Drugs Act, 1875, and all officers employed under that Act are hereby empowered and required to carry out the provisions of this Act."

By s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), as amended by s. 27 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), the person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the

article his intention to have the same analysed by the public analyst, and shall divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst.

Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19: "(1.) When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof, notwithstanding anything contained in section twenty of the Sale of Food and Drugs Act, 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

and returned to the offices of the Board of Agriculture and Fisheries. There N. W. M. Brunton sealed the samples with the seal of the Board, and they were on a later day delivered at the Government laboratory.

In taking the samples neither the appellant nor N. W. M. Brunton divided the same into three or four parts or at all, nor did they or either of them give one part to the respondents or their servants nor say that the samples had been taken for analysis by the public analyst nor seal or mark the samples at the time. They took the samples in their capacity as officers of the Board of Agriculture and Fisheries.

Evidence of the facts above stated having been given, the Government analyst was tendered as a witness on behalf of the appellant to prove the nature of the samples; whereupon counsel for the respondents contended,

(a) that the oral evidence of the Government analyst or any certificate given by him was inadmissible on the ground that the procedure prescribed by the Sale of Food and Drugs Acts, 1875 to 1907, had not been followed, and

(b) that any prosecution in the premises could not be instituted after the expiration of twenty-eight days from December 6, 1910, on the ground that s. 19 of the Sale of Food and Drugs Act, 1899, applied.

It was contended on behalf of the appellant that the inspectors had acted under the provisions of s. 2 of the Butter and Margarine Act, 1907, and that s. 14 of the Sale of Food and Drugs Act, 1875, and s. 19 of the Sale of Food and Drugs Act, 1899, did not apply.

The magistrate held that the evidence of the Government analyst tendered to shew the nature of the samples taken by the inspectors was inadmissible inasmuch as the provisions of the Sale of Food and Drugs Acts, 1875 to 1907, had not been complied with.

He also held that, as the Butter and Margarine Act, 1907, must be considered as one with the Act of 1899, the limitation of time prescribed in s. 19 of that Act applied, and that the proceedings, not having been instituted until more than three months after the samples were taken, were instituted too late.

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He accordingly dismissed the summons, but stated this case for the opinion of the King's Bench Division in which the foregoing facts appeared.

A. Neilson, for the appellant. The magistrate ought to have admitted the evidence of the Government analyst. There is a sharp distinction to be drawn between cases where a sample is purchased for analysis by a private person, e.g., under s. 12 of the Sale of Food and Drugs Act, 1875, and where a sample is taken by a public officer, e.g., under s. 13 of that Act, or under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, or s. 2 of the Act in question, the Butter and Margarine Act, 1907. In the first class of cases the formalities prescribed by s. 14 of the Act of 1875 must be observed; to the second class those formalities are inappropriate: *Rouch v. Hall* (1); *Morton v. Fyfe*. (2) Those cases were both decided upon s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, which is analogous to s. 2 of the Butter and Margarine Act, 1907. The evidence was not tendered in the present case with a view of shewing that there was being exposed for sale by the respondents an article of food or a drug which was not of the nature, quality, or substance demanded by the purchaser. It was taken with a view of shewing that the respondents had in their factory a substance known as milk powder, neither an article of food nor a drug, but a substance which is used for the adulteration of butter. By s. 3 of the Butter and Margarine Act, 1907, if a substance intended to be used for the adulteration of butter is found in any butter factory, the occupier of the factory is guilty of an offence under the Act; and if there is found any oil or fat capable of being so used, it is to be deemed to be intended for that purpose, unless the contrary is proved. To an offence under that section the formalities prescribed by s. 14 of the Act of 1875 are inapplicable: *Buckler v. Wilson*. (3) It is not necessary in all cases under the Act of 1875 that those formalities should be observed. *Parsons v. Birmingham Dairy Co.* (4), which decided that what applied to a private purchaser applied equally to a public officer, is

(1) 6 Q. B. D. 17.

(2) (1896) 24 R. (J. C.) 9.

(3) [1896] 1 Q. B. 83.

(4) (1882) 9 Q. B. D. 172.

inconsistent with *Rouch v. Hall* (1); it was not followed in *Guardians of Enniskillen v. Hilliard* (2), and was disapproved in *Buckler v. Wilson*. (3)

Secondly, as to the limit of time within which proceedings are to be taken, s. 19, sub-s. 1, of the Sale of Food and Drugs Act, 1899, which provides that any prosecution under the Sale of Food and Drugs Acts shall not be instituted after the expiration of twenty-eight days from the time of the purchase, only applies "when any article of food or drug has been purchased by any person for test purposes." That was not the case here. The sample was not purchased.

Macmorran, K.C. (*Eustace Hills* with him), for the respondents. Sect. 14 of the Sale of Food and Drugs Act, 1875, has been applied to proceedings under s. 3 of the Act of 1907 by s. 11, sub-s. 2, of that Act, which introduces the machinery of s. 12 of the Margarine Act, 1887, including s. 14 of the Sale of Food and Drugs Act, 1875. That being so, it is not for this Court to inquire whether the formalities prescribed by that section are or are not applicable to an offence under s. 3 of the Act of 1907. But if it were, they are not inapplicable. The only power to take samples which is given by the Act is that conferred by s. 2 to take samples for analysis. Then s. 14 of the Act of 1875 is introduced. That section applies to "the person purchasing any article." It follows that a public officer taking a sample under s. 2 of the Act of 1907 is a person "purchasing an article" within the meaning of the Sale of Food and Drugs Acts. In s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, the Legislature speaks of an officer "purchasing" a sample under s. 13 of the Act of 1875. The main reason for the decision in *Rouch v. Hall* (1) was the argument ab inconvenienti that the vendor might be living at a great distance, so that it would be impossible to comply with the provisions of s. 14 of that Act. There is no such inconvenience when samples are taken under s. 2 of the Act of 1907, and there is nothing to prevent s. 14 of the Act of 1875 from applying in accordance with the express enactment in s. 11 of the Act of

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(1) 6 Q. B. D. 17.

(2) (1834) 14 L. R. Ir. 214.

(3) [1896] 1 Q. B. 83.

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1907. A public officer taking a sample under s. 2 of the later Act must therefore notify his intention to have the same analysed by the public analyst and must divide the sample into three parts as prescribed by s. 14 of the Act of 1875. A similar course of action is expressly prescribed by s. 2 of the Sale of Food and Drugs Act, 1899. The observance of these formalities has been held more than once to be a condition precedent to any proceeding for an offence: *Barnes v. Chipp* (1); *Smart v. Watts*. (2)

Secondly, the prosecution ought to have been commenced within twenty-eight days from December 6, the date on which the article of food was purchased within the meaning of s. 19 of the Sale of Food and Drugs Act, 1899.

Counsel was not heard in reply.

LORD ALVERSTONE C.J. The main question is whether all the conditions specified in s. 14 of the Sale of Food and Drugs Act, 1875, must be observed upon the taking of a sample under s. 2 of the Butter and Margarine Act, 1907, before proceedings can be taken for an offence under s. 3 of that Act. The objection taken by the respondent goes not merely to the evidence of the analyst, but to the prosecution itself. If those conditions are obligatory they must be complied with, otherwise a prosecution cannot proceed.

There is also a subsidiary question, whether the time limit prescribed by s. 19 of the Sale of Food and Drugs Act, 1899, applies to a prosecution for an offence under s. 3 of the Act of 1907.

The difficulty of the questions raised has been commented upon by text-writers, who have pointed out that there is a doubt as to the procedure to be followed for taking samples under s. 2; but that very obscurity is some help to us in deciding this case, for where as in s. 3 proceedings are authorized and approved by the Legislature, clear language is required to impose limitations and restrictions upon those proceedings. It has been held that, in cases to which s. 14 of the Act of 1875 applies, the observance of the prescribed formalities is a condition precedent

(1) (1878) 3 Ex. D. 176,

(2) [1895] 1 Q. B. 219,

to any prosecution, and if there was nothing to differentiate the object with which this sample was taken from the object with which a purchaser takes a sample from a vendor under s. 14 of the Act of 1875, or any Act incorporating that section, there would be much force in the argument for the respondent. On this point we are not without authority, as will shortly appear. First, I wish to say that this sample was taken under s. 2 of the Act of 1907, which empowers the officer to enter registered premises "and to take samples for analysis" of any butter, &c. Those words are relied on by the respondent. The sample in this case was taken for analysis. The offence with which he was charged, however, is an offence under s. 3, which provides that if any substance intended to be used for the adulteration of butter is found in any butter factory the occupier of the factory shall be guilty of an offence. The offence may be established without the help of any analysis; if any oil or fat capable of being used for the adulteration of butter is found, it is to be deemed to be intended for that purpose unless the contrary is proved. In other words there is *prima facie* proof of an offence in the mere presence in the factory of oil or fat capable of being used for adulteration. In such a case a sample might be taken for the purpose of shewing that it was oil or fat, but then it would not be taken for the purpose of ascertaining by analysis whether an offence has been committed and of proving, if necessary, by analysis that it has. An offence may be established without any such proof. In the face of such a clear and simple enactment, the Court will not lightly introduce all the conditions and formalities in s. 14 of the Act of 1875 and hold that unless they are observed and complied with there shall be no prosecution for the offence.

The respondent relies on s. 11, sub-s. 2, of the Act of 1907, which enacts that s. 12 of the Margarine Act, 1887, shall apply to proceedings under the later Act; s. 12 of the Margarine Act, 1887, provides that all proceedings under that Act shall, save as varied by that Act, be the same as prescribed by ss. 12 to 28 of the Act of 1875. That is a series of sections dealing with the analysis of food and drugs. Sect. 12 gives a purchaser of such articles the right on payment as therein provided to have the

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article analysed by a public analyst and to receive from him a certificate of the result of the analysis. I omit s. 13 for the moment. By s. 14, as amended by the Sale of Food and Drugs Act, 1899, the person purchasing the article and intending to have it analysed is to notify the seller of his intention and to divide the article into three parts; the three parts are to be then and there separated, and each part is to be marked and sealed; and, if required, one part is to be delivered to the seller. Do all these provisions apply to the taking of a sample under s. 2 of the Act of 1907? That is the main question, and carries with it the subsidiary question as to the limit of time for commencing proceedings.

It is quite possible to take either view. It would be quite reasonable to enact that if samples are taken at all to be used in evidence, whether to support the prosecution or to check the defence, they shall only be used where the defendant has had the protection afforded by the division of the sample into three parts. On the other hand it is a possible view that purchase for analysis is a special case and therefore to be specially dealt with, and that it is only in this case that the seller requires protection, and not in the case where the sample is taken by a public officer appointed to carry out the provisions of the Act in question. In the same group of sections occurs s. 13, which empowers any medical officer of health and certain other officers to procure samples of food or drugs and submit them to be analysed by a public analyst, who, upon payment as therein mentioned, is to analyse the same and give a certificate to the officer specifying the result of the analysis. A similar provision occurs in relation to milk in s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, and in relation to margarine in s. 8 of the Margarine Act, 1887. Is there any distinction to be drawn between the taking of samples under these enactments and the taking of samples under s. 14 of the Act of 1875? The case of *Parsons v. Birmingham Dairy Co.* (1) tends to the conclusion that there is no such distinction, but that whether the food or drug is bought by a private purchaser or by a public officer a notification that the article is taken for analysis must equally be given to the

(1) 9 Q. B. D. 172.

seller; but that case can no longer be considered a binding authority since the decision in *Buckler v. Wilson*. (1) Those cases have no direct bearing upon the present, because in neither case was the purchase made with the intention of having the article submitted for analysis. But in the case of *Rouch v. Hall* (2) the question was directly raised under an enactment analogous to that in the present case. There a sample of milk in course of delivery was procured by an inspector of nuisances under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879. That section provided that, if the inspector should suspect the milk to have been sold contrary to the provisions of the Act of 1875, he should submit the same to be analysed, and the same should be analysed, and that proceedings should be taken, and penalties on conviction be enforced in like manner in all respects as if the inspector had purchased the same from the seller under s. 13 of the Act of 1875. The Court expressly decided that this enactment did not introduce the restrictions imposed by s. 14 of the Act of 1875, and that therefore a notification under that section to the seller of the milk by the inspector that he intended to have the sample analysed by the public analyst was not a condition precedent to a prosecution. That is a decision in favour of the present appellant unless an officer acting under s. 2 of the Butter and Margarine Act, 1907, is in a different position from an officer acting under s. 13 of the Sale of Food and Drugs Act, 1875. In my opinion he is in a similar position, and we cannot without overruling the principle of *Rouch v. Hall* (2) decide that an inspector taking a sample under s. 2 of the Act of 1907 is bound to notify to the seller his intention to have the same analysed by the public analyst. Further, having regard to the language of s. 3 and to the fact that it creates an offence which may be proved without the evidence of any analyst, I cannot think that an inspector taking a sample for analysis under s. 2 with a view to establishing an offence under s. 3, thereby brings into operation all the conditions and formalities prescribed by s. 14 of the Act of 1875. If the Legislature had intended that those restrictions should apply to proceedings for an offence under s. 3 of the Act of 1907, I cannot doubt that

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(1) [1896] 1 Q. B. 83.

(2) 6 Q. B. D. 17.

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there would have been a clearer expression of that intention, either by enacting that the observance of those formalities should be a condition precedent to any prosecution or by some other equivalent provision. The result is in my opinion that the principle of *Rouch v. Hall* (1) governs this case, and that the objection taken by the respondent was taken at too early a stage, or went much further than the statute warrants.

For the same reason I think that the statutory limit of twenty-eight days within which the proceedings mentioned in s. 19 of the Sale of Food and Drugs Act, 1899, must be taken has no application to these proceedings. That section applies where an article of food has been purchased for test purposes. There was no such purchase here. The appeal must therefore be allowed, and the case must go back to the magistrate to be heard on its merits.

PICKFORD J. I am of the same opinion, because in my view this case is governed by the principle of *Rouch v. Hall*. (1) It is not necessary to say what our decision might be in the absence of that authority. As it stands it is a decision upon s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879. That section provides that certain public officers may procure samples of milk in course of delivery and shall in a certain event submit the same to be analysed; that the same shall be analysed and that proceedings shall be taken and penalties on conviction be enforced in like manner in all respects as if the officer had purchased the same from the seller or consignor under s. 13 of the Sale of Food and Drugs Act, 1875. The Act of 1879 was an Act amending the Act of 1875, and therefore the provisions in s. 14 and the other provisions of the principal Act would apply to the amending Act, although there were no section in the latter Act expressly enacting that the two Acts should be read together. The Court decided that the restrictions or safeguards specified in s. 14 of the Act of 1875 did not apply where a sample was taken under s. 3 of the Act of 1879. No doubt the Court pointed out that there were inconveniences which might arise in that case and which would not arise in the present case, from applying

(1) 6 Q. B. D. 17.

those restrictions. They also pointed out that s. 13 of the Act of 1875 was expressly mentioned in s. 3 of the Act of 1879; but the mention of s. 13 is not necessarily exclusive of the provisions of s. 14 as was pointed out by one of the learned judges in the Scotch case of *Morton v. Fyfe*. (1) But apart from these considerations, it is impossible to read the judgments in *Rouch v. Hall* (2) without seeing that the Court were of opinion that in the case of samples taken under s. 3 of the Act of 1879 by a public officer the same restrictions are not necessary as in the case of a sample purchased in the ordinary way on a sale by retail, and that they are not to be imposed except by clear words.

In the present case the sample was taken under s. 2 of the Butter and Margarine Act, 1907, a section giving to public officers powers similar to those conferred by s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, to take samples without purchase. In my view the principle of *Rouch v. Hall* (2) applies to samples taken under that section. It cannot be said that s. 14 of the Act of 1875 in terms applies to the taking of the sample in the present case, because that section prescribes what is to be done by "the person purchasing" and in the present case there is no person purchasing. The Legislature might have enacted that the course of action prescribed by s. 14 of the Act of 1875 for a person purchasing should be followed by a person taking samples under the later Acts. But this has not been done, and s. 14 does not in terms apply, and, that being so, we ought, following the principle of *Rouch v. Hall* (2), to decline to apply it. Therefore in my opinion the restrictions imposed by s. 14 of the Act of 1875 do not apply in this case.

The same considerations apply to the question of the limitation of time. That limitation is prescribed by s. 19 of the Sale of Food and Drugs Act, 1899, only in cases "when any article of food or drug has been purchased from any person for test purposes." In the present case there was no purchase. It is not for the Court to extend beyond its actual words a section limiting

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(1) 24 R. (J. C.) 9.

(2) 6 Q. B. D. 17.

1912 the time for enforcing the provisions of an Act of Parliament.

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I agree, therefore, that this appeal should be allowed.

AVORY J. I agree and have nothing to add.

Appeal allowed.

Solicitor for appellants: *Percy J. Nicholls.*

Solicitors for respondent: *Charles Anderson & Co.*

W. H. G.

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MILLARD v. ALLWOOD.

Jan. 16.

Margarine—Sale by Retail—Printed Matter on Wrapper—Transparent Wrapper—Gummed Label—"Green Leaf Margarine"—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 6.

By s. 6 of the Margarine Act, 1887, as amended by s. 6 of the Sale of Food and Drugs Act, 1899, every person selling margarine by retail, save in a package duly branded or durably marked as therein mentioned, shall deliver the same to the purchaser in a paper wrapper on which shall be printed as therein directed "margarine," and no other printed matter shall appear on the wrapper.

A retail dealer sold by retail a parcel of margarine in a cardboard case bearing on its outside an impression of a cabbage leaf and the words "Green Leaf Margarine"; the cardboard case was wrapped in a wrapper of thin transparent paper upon which was printed "margarine." The words "Green Leaf Margarine" appeared through this wrapper.

The wrapper was fastened at each end by means of a circular gummed label on which was printed the phrase "4d. per packet about $\frac{1}{2}$ lb."

The dealer having been convicted of an offence under the Sale of Food and Drugs Acts, 1875 to 1899, the Court, affirming the conviction,

Held that the words "Green Leaf" appearing through the outside transparent wrapper might constitute, and that the printed matter "4d. per packet about $\frac{1}{2}$ lb." did constitute, a breach of s. 6 of the Act of 1887 as amended by s. 6 of the Act of 1899.

Williams v. Baker [1911] 1 K. B. 566, followed.

CASE stated by the stipendiary magistrate for South Staffordshire.

An information was laid by George Frederick Allwood, inspector of weights and measures for the borough of Wolverhampton,

hereinafter called the respondent, against Joseph Millard, hereinafter called the appellant, under s. 6 of the Margarine Act, 1887, and s. 6 of the Sale of Food and Drugs Act, 1899 (1), charging that the appellant did unlawfully sell by retail to the respondent a certain quantity of margarine which was not in a package durably marked in accordance with the said Acts, and did not deliver the same to the respondent in a paper wrapper on which was printed in capital block letters not less than half an inch in length and distinctly legible "margarine," and with no other printed matter on the wrapper.

On the hearing of the information the following facts were proved or admitted:—

1. The appellant was a retail dealer in margarine carrying on business in Wolverhampton.

(1) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6:

"Every person dealing in margarine . . . shall conform to the following regulations:

"Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom, and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square 'Margarine'; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'"

Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 6:

"

"(2.) The letters required to be printed on the paper wrapper in which margarine . . . is sold shall be capital block letters not less than half an inch long and distinctly legible, and no other printed matter shall appear on the wrapper.

"(3.) The words 'or with' in section 6 of the Margarine Act, 1887, shall be repealed."

Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 8: "If in any wrapper enclosing margarine, or on any package containing margarine, or on any label attached to a parcel of margarine, or in any advertisement or invoice of margarine a person dealing in margarine describes it by any name other than either 'margarine,' or a name combining the word 'margarine' with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries and printed in type not larger than and in the same colour as the word 'margarine,' he shall be guilty of an offence under this Act."

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2. The appellant sold to the respondent a certain quantity of margarine exposed for sale in packets each of the weight of half a pound or thereabouts. The packets numbered at least fourteen and were so piled up that in some cases the printed word "margarine" alone could be seen by the respondent, whereas in other cases the words "Green Leaf Margarine" alone were visible through the outer transparent wrapper, whilst at both outside ends of each packet was a small label marked "4d. per packet about $\frac{1}{2}$ lb."

3. The margarine contained in the packet purchased for analysis by the respondent was found to be wrapped in this wise: The substance itself was first wrapped in a piece of parchment paper containing no printed matter whatever. This parcel was enclosed in a cardboard case bearing on the outside the impression of a cabbage leaf and the words "Green Leaf Margarine," and containing within it small circulars or leaflets having reference to a prize scheme and advertising margarine. The cardboard case was closed by folding the flaps at each end and inserting tongues cut in one flap into slits cut in the opposite flap. Finally round the cardboard case was placed a thin transparent wrapper upon which was printed the word "margarine." This wrapper was fastened at each end of the packet by means of a circular gummed label upon which was printed the phrase "4d. per packet about $\frac{1}{2}$ lb."

The provisions of the Sale of Food and Drugs Acts in regard to analysis were fully complied with.

On the hearing of the information the respondent, among other contentions not material to this report, urged—

(a) that although no printed matter other than the word "margarine" appeared on the outward transparent wrapper, yet the words "Green Leaf" appearing through that wrapper constituted a breach of s. 6 of the Act of 1887 as amended by s. 6 of the Act of 1899;

(b) that the two gummed labels containing the printed matter "4d. per packet about $\frac{1}{2}$ lb." appearing on the same wrapper also constituted a breach of the same enactment;

(c) that s. 6 of the Act of 1887 and s. 6 of the Act of 1899 must be read together with s. 8 of the Butter and Margarine Act,

1907 (7 Edw. 7, c. 21), and that the true meaning and effect of the last-mentioned enactment was that if in every wrapper enclosing margarine a person dealing in margarine describes it by any other name than "margarine," or a name combining the word margarine with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries, and printed as therein prescribed, he is guilty of an offence under the Act of 1907.

The appellant contended that, as the information only charged him with an offence under s. 6 of the Act of 1887 as amended by s. 6 of the Act of 1899, he could not be convicted of any offence under the Act of 1907; and that as no printed matter other than the word "margarine" appeared on the outer transparent wrapper, he was not guilty of any offence under the earlier enactments.

The magistrate found on the above facts that the appellant had committed an offence under the statutes; he held that the Act of 1907 must be read with the Acts of 1887 and 1899, and that the words "if in any wrapper" in s. 8 of the last-mentioned Act meant "if in every wrapper." He accordingly convicted the appellant and adjudged him to forfeit and pay the sum of 20s. and costs.

He submitted the following question to the Court: Whether the appellant had committed an offence against s. 6 of the Margarine Act, 1887, s. 6 of the Sale of Food and Drugs Act, 1899, and s. 8 of the Butter and Margarine Act, 1907, or any of them, although the last-mentioned Act was not mentioned in the information or summons.

Ricardo, for the appellant. The magistrate was wrong in introducing the Butter and Margarine Act, 1907, into this case. The appellant was not charged with and therefore could not be convicted of any offence under that statute.

The conviction can only be supported by shewing an offence under s. 6 of the Margarine Act, 1887, as amended by s. 6 of the Sale of Food and Drugs Act, 1899. That enactment provides that every person selling margarine by retail, save as therein mentioned, shall deliver the same to the purchaser in a paper

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wrapper on which shall be printed "margarine," and that no other printed matter shall appear on the wrapper; that is to say no other printed matter shall appear imprinted on the wrapper. In the present case the margarine was delivered to the purchaser in a paper wrapper on which was printed "margarine," and no other printed matter appeared imprinted on the wrapper. The enactment was carefully observed in every detail. As a matter of fact the word "margarine" did appear on the outside wrapper; but this is not necessary, because it is nowhere enacted that the wrapper containing the word "margarine" must be the outside wrapper. This has been recognized in *World's Tea Co. v. Gardner* (1) and *Toler v. Bishop*. (2) The enactment is that the margarine shall be delivered to the purchaser "in a wrapper." Where there is only one wrapper, as in *Williams v. Baker* (3), there from the nature of the case, but not by any express enactment, the word must be printed on the outside wrapper; but where, as in the present case, there are two or more wrappers, the enactment is satisfied if the word "margarine" and no other printed matter appear on any one of them. There is therefore nothing in the point that the words "Green Leaf" appear through the transparent wrapper. As to the phrase "4d. per packet about $\frac{1}{2}$ lb.," it is not printed on the outside wrapper, and therefore, even if it were enacted that the outside wrapper should be free from printed matter other than the word "margarine," there would be no breach of that enactment in the present case.

In view of the decision in *Williams v. Baker* (3) no course other than that adopted by the appellant is possible to a retail dealer selling margarine under a name combining the word "margarine" with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries. According to that decision, if the combination appear on the outside wrapper the dealer is guilty of an offence under s. 6 of the Act of 1887 as amended by s. 6 of the Act of 1899; if the combination appear through the outside wrapper he is guilty of a similar offence if the view of the magistrate in the present case is correct; if the

(1) (1895) 59 J. P. 358.

(2) (1896) 60 J. P. 9,

(3) [1911] 1 K. B. 566.

combination may only appear on an inside wrapper, and must not be seen through the covering wrapper, it might as well not be used at all.

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McCardie, for the respondent. The conviction was right. The object of this legislation is to protect the purchaser. He is to know what he is getting. First the Act of 1887 provided that a person selling margarine by retail should deliver it in or with a proper wrapper on which there should be printed in letters of a certain size "margarine." Then a practice grew up of adding other words to and so obscuring the word "margarine" on the wrapper: see *Fyfe v. McLaughlin* (1); *World's Tea Co. v. Gardner*. (2) This led to the passing of s. 6 of the Act of 1899, amending s. 6 of the Act of 1887, and enacting that the margarine should be delivered in (and not with) a wrapper on which the word "margarine" should be printed in letters of a certain size, and that no other printed matter should appear on the wrapper. Then it was found that other printed matter, applying fancy names and descriptions to what was margarine, was being inserted between the margarine and the wrapper. The cases of *Tanner v. Dyball* (3) and *Keeloma Dairy Co. v. Jones* (4) are instances of this. The Legislature intervened to control this practice and passed the Butter and Margarine Act, 1907, only permitting certain descriptive or fancy names approved by the Board of Agriculture and Fisheries to appear in any wrapper. The words "in any wrapper" in s. 8 of that Act have their ordinary meaning and do not mean "on any wrapper"; and that enactment did not affect the provision of s. 6 of the Act of 1899: *Williams v. Baker*. (5)

[LORD ALVERSTONE C.J. My brother Avory had doubts as to the effect of s. 8 of the Act of 1907 in that respect.]

Considering the object with which that enactment was passed, it is submitted that *Williams v. Baker* (5) could not have been otherwise decided. The result of the legislation is that "margarine," and no other printed matter, may appear on the wrapper in which the substance is delivered to the purchaser.

(1) (1893) 30 Sc. L. R. 899.

(3) (1906) 70 J. P. 279.

(2) 59 J. P. 358.

(4) (1906) 70 J. P. 533.

(5) [1911] 1 K. B. 566.

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In the present case the device of a transparent cover, with words other than "margarine" appearing through it, is a mere evasion of s. 6 of the Act of 1899.

Further, if it were necessary to argue it, the phrase "4d. per packet about $\frac{1}{2}$ lb." is printed matter appearing on the wrapper and also constitutes a breach of the same enactment.

Ricardo in reply.

LORD ALVERSTONE C.J. The discussion in this case has justified the doubt felt by my brother Avory in *Williams v. Baker* (1), but I am still of opinion that we ought not to hold that s. 8 of the Butter and Margarine Act, 1907, has impliedly repealed s. 6 of the Sale of Food and Drugs Act, 1899. Consistently with giving full force and effect to the wording of that enactment the case of *Williams v. Baker* (1) could not have been decided otherwise. If that decision does not express the intention of the Legislature it should be made the subject of a repealing Act.

I cannot assent to the contention of Mr. Ricardo that the provisions of the Legislature are complied with if somewhere in the parcel there is a wrapper containing the word "margarine" and nothing more, and that if that condition is satisfied then any other words may appear upon any other wrapper inside or outside. If that were so it would reduce these provisions to a nullity. The legislation on this matter began with the Margarine Act, 1887, s. 6 of which provided that every person selling margarine by retail, save in a package duly branded or durably marked as prescribed, should in every case deliver the same "in"—I omit the words "or with" which were subsequently repealed—"a paper wrapper on which shall be printed in capital letters"—of a certain size—"margarine." The distinction between the package which the retail dealer receives from the wholesale dealer and the parcel enclosed in the wrapper appears more than once in the Act. So the matter stood under the Act of 1887. Then came the decisions in *World's Tea Co. v. Gardner* (2) and the Scotch case of *Fyfe v. McLaughlin* (3), which countenanced the appearance of other printed matter

(1) [1911] 1 K. B. 566.

(2) 59 J. P. 358.

(3) 30 Sc. L. R. 899.

obscuring the word "margarine" upon the wrapper. In consequence of those decisions s. 6 of the Sale of Food and Drugs Act, 1899, was enacted, prescribing that the letters required to be printed on the paper wrapper in which margarine is sold should be capital block letters not less than half an inch long and distinctly legible, and that no other printed matter should appear on the wrapper. It further amended s. 6 of the Act of 1887 as I have said and in effect provided that margarine should be delivered to the purchaser "in," and not "with," a wrapper. The intention of that enactment is clear, that margarine should be delivered in a wrapper on which the word "margarine" should appear distinctly in letters of a certain size, and that nothing else should appear on the wrapper. This was followed by the Butter and Margarine Act, 1907, which provided by s. 8 that if in any wrapper enclosing margarine or on any package containing margarine, or on any label attached to a parcel of margarine, or in any advertisement or invoice of margarine, a person dealing in margarine describes it by any name other than either "margarine" or a name combining the word "margarine" with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries, and printed in type not larger than and in the same colour as the word "margarine," he shall be guilty of an offence. This Court in *Williams v. Baker* (1) decided that this enactment did not authorize the printing of any words other than "margarine" on the outside of the wrapper. We are bound by that decision, and I still hold the opinion that it was not intended by s. 8 of the Act of 1907 to repeal the provisions of s. 6 of the Act of 1899 as to what should appear upon the wrapper.

I come now to the facts of this case. Through the transparent outside covering, on which the word "margarine" is printed in red, the words "Green Leaf" can be clearly seen, so that they appear to be more or less on the covering itself according as it is more or less transparent. Does this constitute an offence under s. 6 of the Act of 1899? In my view it may do so. It is for the magistrate to say whether in a given case it does or not. Assuming as we must that the section forbids the appearance of anything

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but the word "margarine" on the wrapper, we should be permitting a patent and obvious evasion of the Act if we sanctioned this or any similar device, such as the cutting away of portion of the outside covering and thus exposing to view words printed on an inner wrapper, or permitting them to appear through a transparent slip, so that they can be read as though they were upon the outside wrapper.

With regard to the two circular gummed labels at the ends of each packet, I should be sorry to decide this case upon this point alone; but if the Legislature has thought fit for the protection of the public to enact that no printed matter except the word "margarine" shall appear on the outside wrapper, it would be ridiculous to hold that a dealer could evade that enactment by pasting or gumming upon the wrapper adhesive slips of paper containing other printed matter. No doubt one would be unwilling to convict, and no magistrate would impose any substantial fine, where such a slip contained merely the weight and price of the packet. Still these labels do contain printed matter which is on the outer covering, and therefore in this respect also there is a breach, though this is in my view a trifling breach, of the enactment. I only desire to add that if it were necessary to pray in aid the Act of 1907 in support of this conviction I should not be prepared to do this. The appellant was not summoned under that statute. As the case stands I cannot say that the magistrate was wrong. The appeal must therefore be dismissed.

PICKFORD J. I agree that the appeal should be dismissed.

AVORY J. I agree. The argument has confirmed the doubt which I felt in *Williams v. Baker*. (1) However, we are bound by that decision. I am clearly of opinion that in this case no question arises under s. 8 of the Butter and Margarine Act, 1907. The offence charged was a breach of s. 6 of the Act of 1887 as amended by s. 6 of the Act of 1899; consequently the only question before the magistrate and before us is whether printed matter other than the word "margarine" appeared on

(1) [1911] 1 K. B. 566.

these wrappers. For the reasons given by my Lord I agree that in the circumstances other printed matter did appear on the wrapper.

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Appeal dismissed.

Solicitors for appellant: *Sharpe, Parker & Co., for Horatio Brevitt, Wolverhampton.*

Solicitors for respondent: *Thorne & Haslam, Wolverhampton.*

W. H. G.

TRUSTEE OF GONVILLE (A BANKRUPT) v. PATENT
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THE SAME v. GONVILLE, JARVIS & CO., LIMITED.

Bankruptcy—Partnership—Judgment Creditor of one Partner—Fraudulent Assignment of Partnership Business to Limited Company—Device to defeat and delay Judgment Creditor—13 Eliz. c. 5.

In November, 1907, separate creditors of the debtor, a partner in a solvent partnership, manufacturing caramel, obtained judgment against him in an action for an injunction restraining him from manufacturing caramel and for damages and costs. Immediately afterwards the debtor and his partner sold and assigned the partnership business as a going concern for fully-paid shares to the Patent Caramel Company, Limited, which was formed for that purpose, and the debtor's partner, being entitled to manufacture caramel, became the managing director of that company. At the same time another limited company was formed to deal in caramel, and the debtor became its managing director. Both companies were formed by the same solicitor, and in each case the debtor and his partner were two of the signatories to the memorandum of association of the company, the other signatories for 1*l.* each being either clerks in the employ of the solicitor or friends. Shortly afterwards the debtor assigned his shares in both companies for value. More than six months afterwards the debtor was adjudicated bankrupt on his own petition. He had no assets, and his judgment creditors were substantially his only creditors. The trustee in bankruptcy brought an action against each company impeaching the above transactions under the statute 13 Eliz. c. 5:—

Held, that the formation of the two companies was a scheme to defeat and delay the creditors of the debtor, and that the assignment of the

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partnership business to the first-named company was fraudulent and void under the statute and must be set aside.

But *held*, that the second action must be dismissed inasmuch as no property was assigned to the second company. (1)

THESE were two actions by the trustee in bankruptcy of one Gonville to set aside certain transactions as being fraudulent and void and a device to defeat and delay the creditors of the bankrupt under the statute 13 Eliz. c. 5, in these circumstances.

Prior to July 31, 1903, Gonville and three other persons were trading under the style of Hay & Co. as manufacturers of caramel under certain letters patent. By a deed dated January 11, 1904, this partnership was determined, so far as Gonville was concerned, as from July 31, 1903, and Gonville covenanted that he would not either directly or indirectly, either alone or jointly or as agent or manager for any person or persons whomsoever, carry on or be concerned in the trade or business of a manufacturer of caramel under the said letters patent; but he was not in any manner prohibited from dealing in caramel so manufactured. On December 31, 1903, Gonville entered into partnership having equal shares and obligations with one J. W. Jarvis, trading under the name of Gonville, Jarvis & Co., as manufacturers of caramel. It was a solvent business, and J. W. Jarvis was entitled to manufacture caramel. On October 27, 1905, the firm of Hay & Co. commenced an action against Gonville in the Chancery Division, alleging that he had committed breaches of his covenant in the deed of January 11, 1904, and claiming an injunction and damages and consequential relief, and on November 27, 1907, they obtained judgment against him with costs, but the order was not passed and entered until December 5, 1907. J. W. Jarvis was aware of but was not a party to this Chancery action. In the meantime, by an agreement dated November 29, 1907, and made between J. W. Jarvis and Gonville as vendors of the one part and M. Haynes as trustee for and on behalf of an intended company to be called the Patent Caramel Company, Limited, of the other part, after reciting that the vendors were carrying on business as caramel manufacturers under the style of Gonville, Jarvis & Co. and the intention to form the company,

(1) An appeal from this decision has been compromised.

it was agreed that the vendors should sell and the company should purchase as a going concern the said business of the vendors and the goodwill and all the assets thereof for 1050*l.*, to be paid as follows: 793 fully paid up ordinary shares of 1*l.* each in the said company to the vendors, 7*l.* in cash, a debenture of the company for 125*l.* to Jane Jarvis, the mother of J. W. Jarvis, and a debenture of the company for 125*l.* to Ellen Gonville, the wife of Gonville; the purchase to be completed on or before December 3, 1907, and the company to undertake and perform all contracts relating to the business and to indemnify the vendors therefrom as from the date of the incorporation of the company, and the vendors to indemnify the company from all debts and liabilities of the business up to that date.

On December 3, 1907, the defendant the Patent Caramel Company, Limited, was incorporated with the principal object of taking over the business of Gonville, Jarvis & Co. as a going concern and of manufacturing caramel in all its branches. The capital of the company was 800*l.* divided into shares of 1*l.* each, and the directors of the company were J. W. Jarvis and one Jackson. On December 6, 1907, the defendant company adopted the agreement of November 29, 1907, and on the same day the business was assigned to the company and the 793 shares were allotted, 397 to J. W. Jarvis and 396 to Gonville, and the two debentures were issued to Mrs. Jarvis and Mrs. Gonville, J. W. Jarvis was appointed the managing director of the company. Gonville shortly afterwards transferred his 396 shares to his wife for 150*l.*

On December 13, 1907, the defendant company, Gonville, Jarvis & Co., Limited, was incorporated with a capital of 100*l.* in shares of 1*l.* each and with the object of dealing in manufactured caramel. The directors were M. Haynes and one Smallman. No property was assigned to the company, but by an agreement dated December 18, 1907, Gonville, in consideration of an allotment to him of fifty fully paid up shares and a salary of 150*l.* per annum, became the managing director of the company, and forty-two shares of the company were allotted to J. W. Jarvis. Shortly afterwards Gonville transferred his fifty shares to

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Dalston, Elliman & Co., his solicitors in the Chancery action, in part payment of the costs due to them.

On September 18, 1908, a receiving order was made against Gonville on his own petition, and the same day he was adjudicated bankrupt. His statement of affairs showed assets nil and liabilities 2786*l.* 13*s.* 1*d.*, of which 2585*l.* 10*s.* was the amount of the taxed costs and damages due to Hay & Co., the plaintiffs in the Chancery action.

The plaintiff commenced both the above-mentioned actions on the same day. In the first action he alleged that under the facts and circumstances above stated the bankrupt had deprived himself of all his assets available for execution, that the agreement of November 29, 1907, was a fraud and a device to defeat and delay the creditors of the bankrupt by virtue of the statute 13 Eliz. c. 5, and he claimed (1.) a declaration that the agreement of November 29 was fraudulent and void under the statute, and (2.) a declaration that part of the property assigned by virtue of the same agreement and taken possession of by the defendant company formed the bankrupt's estate divisible amongst his creditors.

In the second action the plaintiff on the same grounds claimed a declaration that the registration and formation of the defendant company on December 13, 1907, was a fraud and a device intended to defeat and delay the creditors of the bankrupt.

Both actions now came on together for trial without a jury.

It appeared that both of the defendant companies were formed and registered by the same solicitor, M. J. Jarvis, and that in each case Gonville and J. W. Jarvis were two of the signatories for one share each to the memorandum of association, and the remaining signatories (including Jackson and Haynes) were either clerks in the employ of M. J. Jarvis or friends of the parties, and that the two companies in December, 1907, entered into an arrangement under which Gonville, Jarvis & Co., Limited, was to sell and dispose of the goods manufactured by the Patent Caramel Company, Limited. J. W. Jarvis and the debenture-holders were not made defendants to either action.

Sir F. Low, K.C., and *Tindale Davis*, for the plaintiff in both actions. The formation of the two companies was a fraudulent scheme to defeat and delay Hay & Co., the judgment creditors of Gonville. The effect of the transaction was to vest all the property of the bankrupt in the Caramel Company, Limited, and by this device the bankrupt divested himself of all his interest in the partnership business and Hay & Co. were prevented from reaping the fruits of their judgment. If the partnership business had continued, Hay & Co. could have obtained under s. 23 of the Partnership Act, 1890, either a charge upon or a receiver of the bankrupt's share in the business. The assignment of the business to the Caramel Company dissolved the partnership. Although there was no assignment of property to the second company, its formation was part of the fraudulent scheme to put all the bankrupt's property beyond the reach of his judgment creditors. Jarvis and Gonville held substantially all the shares in the two companies and were the managing directors, and the second company under the agreement to sell the produce of the Caramel Company in effect obtained the goodwill of that company.

F. Mellor, for the Patent Caramel Company, Limited. Jarvis was independent and solvent and entitled to manufacture and sell caramel, and the partnership continued until the sale to the company. There is no evidence that Jarvis knew of Gonville's breach of covenant until the trial of the Chancery action. Then he found himself with a half-share in a solvent business and an undesirable partner. What was he to do? He was entitled to protect his own interest and to realize his solvent business to the best advantage. It is submitted that the sale of it to a company was not improper—*Salomon v. Salomon & Co., Ltd.* (1)—and converted it into something more tangible in the form of shares which could be followed. Jarvis is not responsible for Gonville having disposed of his shares. If the judgment creditors had taken proper proceedings they could have attached his shares. The sale to the company cannot be impeached as fraudulent under sub-s. 1 (b) of s. 4 of the Bankruptcy Act, 1883, because it is out of time, and there is no case in the books in which a sale to a company has been set aside under the statute of Elizabeth. All

(1) [1897] A. C. 22.

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the cases from *In re Hirth* (1) to the present time have been decisions under the Bankruptcy Act and have been cases of a sole trader. In the case of *In re Slobodinsky* (2) a bona fide co-vendor, Melinski, was held entitled to a charge on the assets of the bankrupt.

E. W. Hansell, for Gonville, Jarvis & Co., Limited. No case is made out against the company under the statute of Elizabeth because no property was assigned to the company. This objection is raised by the defence which was delivered in July, 1911. The company is a proper legal entity and was legitimately incorporated on December 13, 1907, and Gonville was perfectly entitled to enter into an agreement of service with it. Even if Gonville is the company, he had a perfect right to say "I will carry on business as a company," and the judgment creditors have not been defeated or delayed by the formation of the company.

Sir F. Low, K.C., in reply. Admitting that *In re Hirth* (1) and other decisions are cases of a sole trader, there is no difference in principle between a trader and his partner combining together to do that which a sole trader may not do.

PHILLIMORE J. I think that the assurance whereby the assets of the partnership of Gonville, Jarvis & Co. were transferred to the Caramel Company, Limited, was an assurance tending to defeat and delay the creditors of Gonville, and was therefore, as far as Gonville was concerned, fraudulent and void under the statute of Elizabeth. I think that I cannot disentangle that assurance. Jarvis has chosen to make himself a party to it. It is an assurance of the partnership business in which Jarvis and Gonville were partners, and as I cannot set it aside in part I must set it aside as a whole. I am quite aware that this is a step in advance of the decisions that have been given since the cases of *In re Hirth* (1) and *In re Slobodinsky* (2), but it seems to me logically to follow, and in the interests of commercial morality to follow, the principles laid down in those cases. I think that the defendants the Caramel Company, Limited, knew all about the transaction through their directors. Jarvis was one of their directors, and Jackson, who was the other director, was clerk to the solicitor

(1) [1899] 1 Q. B. 612.

(2) [1903] 2 K. B. 517, 530.

who promoted the company and who was Jarvis's solicitor for the purpose apparently of all the legal documents that were prepared. I am certain, therefore, that Jarvis knew all about it just as much as Gonville. Therefore I think I am not outstepping the bounds when I set the transaction aside and make a declaration in the terms of the first paragraph of the claim in the action against the Patent Caramel Company, Limited, to the effect that the agreement of November 29, 1907, was fraudulent and void under the statute; and there will also be a declaration that the property assigned by virtue of that agreement and taken possession of by the defendant company formed the assets of the firm in which the bankrupt was a partner, and that the plaintiff as the trustee in bankruptcy is entitled to the bankrupt's interest therein, with consequential relief. I would only observe that, as the case was proved against the company and against Mr. Jarvis in his capacity as director of the company, he was not called in his private capacity to disprove the facts alleged against him, and I have no doubt that one of the objects of the formation of that company was to defeat and delay the claim rapidly maturing of the plaintiffs Hay & Co. in the Chancery action against Gonville, and I have no hesitation, though it is a further step, in saying that the arm of the law is long enough to upset the transaction with costs.

As regards the other company, Gonville, Jarvis & Co., Limited, there was no assurance to them of any part either of the assets of the bankrupt or of the assets of the firm in which the bankrupt had an interest which can be fastened upon and declared fraudulent and void. No doubt the formation of that company was part of the scheme whereby the interests of the bankrupt and Jarvis were to be as far as possible kept alive and made to bring forth fruit, and it was also part of the scheme for avoiding the effects of the judgment in the Chancery action. But I cannot find any passing of property in the formation of that company, or in the agreement whereby that company appointed Gonville its managing director and gave him by way of remuneration a salary and certain fully-paid shares. Therefore I must give judgment for that company. I think that since the delivery of the defence of that company the case ought not to have been

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pressed against it, and that I shall sufficiently mark my view of the share which the promotion of that company had in the whole scheme by dismissing the action against it with costs since defence delivered.

Solicitors for plaintiff in both actions: *Clement Dennis & Co.*

Solicitor for the defendant the Patent Caramel Company, Limited: *M. J. Jarvis.*

Solicitors for the defendant Gonville, Jarvis & Co., Limited: *R. Raphael & Co.*

H. L. F.

1912
 Feb. 19.

In re GOLDBURG (No. 2).

Ex parte PAGE.

Bankruptcy—Assignment of Debtor's Business to Company—Debentures—Bankruptcy of Debtor—Business carried on by Receiver of Debenture-holders—Assignment to Company set aside as fraudulent—Liability of Receiver to account to Trustee in Bankruptcy.

Where the transfer of a debtor's business to a company is subsequently set aside as an act of bankruptcy to which the title of the trustee in bankruptcy relates back, and the business of the company has in the meantime been carried on by a receiver appointed by the debenture-holders of the company, the receiver is liable as a trespasser to account to the trustee for the assets (if any) of the debtor which may have come to his hands or for the value of them.

THIS was an application by the trustee in bankruptcy against the debenture-holders of a one man company and their receiver for an account in these circumstances.

In and prior to July, 1910, the debtor was carrying on the business of a milliner at leasehold premises in Oxford Street, and the lease and the book debts of the business were mortgaged to one Silverstone for 500*l.* and 200*l.* respectively for money lent to the debtor. Both these mortgages were valid securities.

On July 28, 1910, the debtor registered a company, and on the same day he entered into an agreement with the company for the sale of the leasehold premises and business as a going concern to the company for 2500*l.* free from incumbrances. The

2500*l.* was to be paid as to 1000*l.* in fully paid up shares and as to 1500*l.* in debentures. It was a one man company, and the debtor and his wife were the only directors. Under this agreement the company took possession at once and carried on the business. Silverstone was not concerned in the formation of the company, and on August 9, 1910, the debtor induced him to accept 700*l.* in debentures of the company in substitution for his two mortgages. Seven debentures of 100*l.* each were accordingly issued by the company to Silverstone, and the mortgages were released. Five debentures of 100*l.* each were also issued to the debtor's wife and were subsequently purchased by one Magna, and three were issued to the debtor. The debentures were in common form.

On September 12, 1910, a creditors' petition was presented against the debtor, on which a receiving order was made on November 22, 1910, adjudication followed, and a Mr. Page was appointed the trustee with a committee of inspection. On June 19, 1911, in consequence of an execution having been levied on the premises of the company, Silverstone and Magna, in exercise of the powers conferred on them by their debentures, appointed a receiver and manager of the business of the company. This appointment was not made under the Conveyancing Act, 1881. On July 8 Page gave the receiver notice of his appointment as the trustee in bankruptcy. On July 18 a compulsory winding-up order was made against the company, and the official receiver became the liquidator.

On October 25, 1911, the Court, on the application of the trustee, set aside the agreement of July 28, 1910, as a fraudulent assignment under 13 Eliz. c. 5, and also as an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883, and the same day the receiver gave up possession of the leasehold premises and business to the trustee.

On December 13, 1911, a claim by Silverstone that he had a charge for 700*l.* on the assets of the debtor was dismissed: see *In re Goldberg*. (1)

The trustee now claimed a declaration, as against Silverstone, Magna, and the receiver, that they were jointly and severally

(1) *Ante*, p. 384.

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liable as trespassers to pay to the trustee the value of the property (if any) of the bankrupt of which they took possession on June 19, 1911, and which they had converted, and an order to deliver up to the trustee all such property (if any) of the bankrupt as remained in their possession or in the possession of either of them, or its value, and for an inquiry on the footing of the declaration.

It appeared that the receiver had carried on the business of the company from June 19, 1911, down to October 25, 1911, and as from July 18, 1911, the date of the winding-up order, with the approval of the official receiver with a view to a sale; that he had filed his statutory accounts pursuant to s. 95 of the Companies Consolidation Act, 1908, which shewed that his total receipts whilst receiver were 768*l.* 14*s.* 4*d.* and his total disbursements 777*l.* 17*s.*, leaving a balance due to him of 9*l.* 2*s.* 8*d.* irrespective of any remuneration. It also appeared that when he took possession the book debts of the business stood at 467*l.* 11*s.* 6*d.*, and there was some stock in trade, and that his disbursements included (*inter alia*) the rent, rates, and taxes of the leasehold premises, limited purchases of stock, and wages.

The trustee subsequently sold the leasehold premises for about 550*l.*

Clayton, K.C., and *F. Mellor*, for the trustee. This application is consequential on the order of October 25 last. It was thought at that time that the company had no assets, but it has since been ascertained that the receiver collected about 770*l.* By virtue of that order and of the doctrine of relation back all the property the subject of the agreement of July 28, 1910, vested in the trustee, and the respondents have wrongfully interfered with and converted that property and must account for it: *Ex parte Vaughan*. (1) The trustee's title is antecedent to that of the company, and the book debts and stock in trade of the business of which the receiver took possession on June 19, 1911, were the debtor's property, and the receiver must deliver it up or pay the value of it. The trustee is willing that the receiver should be allowed a reasonable sum for collecting the book debts.

(1) (1884) 14 Q. B. D. 25,

Gore-Browne, K.C., and *H. E. Wright*, for the receiver. There is no sufficient evidence that the assets of the debtor in existence when the business was transferred to the company were in existence when the receiver took possession, except the lease which the trustee has since sold. The receiver was the agent of the debenture-holders, and the trustee has stood by and allowed him to carry on the business, and if he has during his receivership disposed of the property in due course of business he is not personally liable as a trespasser, but is only liable to account for the bankrupt's property (if any) remaining in his hands: *In re Ely*. (1) Here the receiver had no notice that the business of the company was about to be retaken by the trustee, and carried it on under the genuine belief that it was the company's business, and, on the principle of *In re Tyler* (2), ought to be allowed all rent, rates, taxes, wages, and other moneys paid by him in carrying on the business and preserving the property.

Tindale Davis, for the debenture-holders, argued to the same effect.

Clayton, K.C., in reply.

PHILLIMORE J. In this case I think the trustee is entitled to a declaration that the respondents are jointly and severally liable as trespassers to pay to the trustee the value of the property (if any) of the bankrupt of which they are in possession, or of which they took possession on or about June 19, 1911, and to deliver up to the trustee all such property of the bankrupt (if any) as remains in their possession or in the possession of either of them, respectively; and I will direct an inquiry which will follow the words of the declaration.

My reasons for this judgment are these. Inasmuch as the assignment by the bankrupt to the company was set aside, any property of the bankrupt which the company took possession of, including book debts, they took possession of as trespassers as against the trustee. That property was the property of the trustee, whose title related back earlier than that of the company. The parties against whom this motion is launched are not the company, but they are debenture-holders of the company and

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(1) (1900) 82 L. T. 501.

(2) [1907] 1 K. B. 865.

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the receiver appointed by the debenture-holders, and it is launched against them because the moment the receiver was put in he took all the assets of the company which were then in existence. Supposing that he had been appointed the day after the assignment to the company, there would be very little difficulty about it. The probability then would have been that he got practically all the assets of the debtor that the company had got. But this motion is launched against the receiver many months afterwards, and it does not follow that any assets of the company of which he took possession were the assets of the bankrupt; and, if they were not, he is not liable for them. Though the company had no assets except the property of the bankrupt, still, if by trading with and using the property which they took over they have made profits and those profits have been turned into goods, or even if they have actually sold those goods and realized the sovereigns, those sovereigns or that profit cannot be charged against the debenture-holders or their receiver. But with regard to any book debts of Goldburg which were collected by the receiver and any stock which was the property of Goldburg and which passed to the receiver, for those book debts and that stock the receiver and his principals are accountable. The two respondent debenture-holders are the principals of the receiver. They concurred in appointing the receiver and he is their agent. But it is suggested that the respondents are not personally liable because, according to *In re Ely* (1), directors of a company in very much the same position were held not personally liable for the assets of a bankrupt which had passed through their hands and had been converted in carrying on the business, but only for the assets (if any) remaining in their hands. I think the answer is that the directors of a company are in a very different position from that of a receiver. Debenture-holders are entitled, if not personally, through their receiver, to take possession of the assets, and they are to be charged, not as servants of the possessor for whom they are administering the assets, or for the assets come into their hands as servants of the possessor, but because they are the possessors. Possession passes to the receiver by the act of the debenture-holders, and

(1) 82 L. T. 501.

whether they ever have possession themselves does not matter. They are the necessary parties to create possession in the receiver. That which the receiver takes possession of, as a trespasser, he must account for, and he cannot set up any claim for anything that he has usefully done. On the other hand, he cannot be charged with any profits that he has made out of the bankrupt's goods. He is merely accountable for those assets of the bankrupt, such as book debts, sovereigns or stock, which are traced to his hands, and he has either to deliver them up or to pay damages for their conversion. It seems here doubtful whether much will be traced to the receiver, and it is barely possible that it will be nothing; but it is so very unlikely that it will be nothing that upon the whole I think I am justified in directing the inquiry. But it is so possible that it will not be much, that I reserve all questions of costs. If the result of the inquiry is that the trustee traces nothing, of course the trustee will pay the costs, and if the result of the inquiry is that the trustee traces very small sums, I shall probably also, having regard to the very particular position of the respondent, order him to pay the costs.

Solicitors : *Boyce & Evans ; James Dowling.*

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[IN THE COURT OF APPEAL.]

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HARRISON v. BULL & BULL.

Feb. 3.

Practice—County Court Action—Certiorari—Removal into King's Bench Division—Summons for Directions on Defendants' Application—Order xxx, rr. 1 and 8.

An action commenced in the county court was removed under an agreement of the parties into the King's Bench Division by a writ of certiorari. The plaintiff not having taken any step in the action after the removal, the defendants took out a summons for directions under Order xxx. :—

Held, that the plaintiff could not be compelled to proceed with the action in the King's Bench Division, and that the defendants were not entitled to an order upon the summons taken out by them.

Garton v. Great Western Ry. Co. (1858) 1 E. & E. 258; 28 L. J. (Q.B.) 103, approved.

APPEAL from Bucknill J. at chambers.

The plaintiff brought an action in the Westminster County Court and obtained a verdict of a jury for 50*l.* The county court judge, on November 16, 1911, ordered a new trial on the ground that the verdict was against the weight of the evidence. On December 18, 1911, upon the case coming on for retrial, an order was made by consent adjourning the case generally upon the plaintiff undertaking to consent to the case being removed into the High Court by a writ of certiorari. The defendants thereupon applied *ex parte* for, and there was issued, a writ of certiorari removing the action into the King's Bench Division. The defendants duly appeared to the writ. The plaintiff not having taken any step in the proceedings in the King's Bench Division, the defendants, on January 5, 1912, took out a summons for directions under Order xxx.

Master Chitty, on the authority of *Garton v. Great Western Ry. Co.* (1), held that there was no obligation upon the plaintiff to proceed with the action in the King's Bench Division and refused to make an order on the defendants' summons.

Bucknill J., on appeal, affirmed the decision of Master Chitty. The defendants appealed.

(1) 1 E. & E. 258; 28 L. J. (Q.B.) 103.

E. F. Spence, for the appellants. By Order xxx., r. 1, the plaintiff in every action, subject to exceptions which do not apply to this case, is bound to take out a summons for directions. Upon his failing to do so the defendant is entitled under r. 8 to apply for an order to dismiss the action and the judge may deal with that application as if it were a summons for directions. The case of *Garton v. Great Western Ry. Co.* (1) is distinguishable because in the present case the removal by certiorari was by the consent of both parties. The object of the rule of practice to which effect was given in that case was to avoid the hardship of compelling a plaintiff to proceed in a Court different from that in which he had commenced his action and from which it had been removed by certiorari granted on an ex parte application. That principle does not apply where, as here, the parties have agreed to the removal. Further, the judgment of Lord Campbell in *Garton v. Great Western Ry. Co.* (2), as reported in the *Law Journal*, shews that he considered that the Court had a discretion to interfere if the circumstances called for it. That discretion should be exercised here as the real intention of the parties was to remove the case into the High Court for the purpose of its being tried there. It would obviously be inconvenient that this action should remain alive but untried for an indefinite period. The only way in which the defendants could prevent that result is by applying under Order xxvii. to dismiss it for want of prosecution, but they cannot make that application unless an order for directions is first made. Formerly under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 58, a plaintiff who failed to declare within a year of the writ of summons being returnable was to be deemed to be out of Court; that section is, however, repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49). The defendants are therefore entitled to an order upon their summons for directions.

Lort-Williams, for the respondent, was not called upon.

FARWELL L.J. In my opinion we ought not to interfere with the course taken by the learned judge and the Master in this

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(1) 1 E. & E. 258; 28 L. J. (Q.B.) 103. (2) 28 L. J. (Q.B.) at p. 105.

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case. It is sufficient to state the facts from the defendants' own affidavit: "The action came on for trial on November 3, 1911, before his Honour Judge Woodfall and a jury and a verdict was returned in favour of the plaintiff. An application was subsequently made to his Honour Judge Woodfall for a fresh trial and an order for a fresh trial was made by him on the ground that the said verdict of the jury was against the weight of evidence. The action again came on for trial on December 18, 1911, when by consent of both parties his Honour Judge Woodfall made an order that the case be adjourned generally on the plaintiff undertaking to consent to a removal of the said action to the High Court of Justice on a writ of certiorari being issued."

Now, under the County Courts Act, 1888, in order to get a removal from that Court it was open to the parties to get the judge to transfer the case to another county court under s. 85, or to apply to the High Court for the removal of the case into the High Court by certiorari or otherwise, as s. 126 provides. The parties are both at one in saying that they agreed that a writ of certiorari should be applied for. The defendants accordingly applied for and obtained the writ. The effect of the writ of certiorari is thus stated in Archbold's Practice, both in the edition of 1879 by Prentice at p. 1410 and in the later edition of 1885 by Chitty at p. 1561: "After the cause has been removed into the Court above by certiorari or habeas, the plaintiff may proceed in the action or not, as he thinks fit." That effect of the writ must be taken to have been known by both parties when they elected to adopt this procedure of certiorari. The passage from Archbold is based upon authorities now of considerable antiquity. It is only necessary, however, to refer to *Garton v. Great Western Ry. Co.* (1), decided by Lord Campbell, Wightman J., Erle J., and Hill J., to shew that that passage correctly states the practice.

It was argued by counsel for the appellants that that case depended on the fact that no consent had there been given, and he asked us to say that what the parties really agreed to in the present case was not a writ of certiorari, but removal into the High Court in such a way as that the case should go on. I

can only answer that both parties consented to the agreement in the same terms : they both agreed to the writ of certiorari, and that necessarily involved all the consequences which arise from a writ of certiorari, and that as a result the plaintiff cannot be compelled to go on. It was argued that the principle did not apply where the writ was issued by consent, but in the case to which I have referred it was argued that the plaintiff having allowed the judge to make the order for removal was seeking to render it nugatory. That is the same argument as is put by the appellants here.

The Court cannot rectify the agreement made between the parties because the legal effect of that agreement is not what they anticipated. We can only deal with the agreement as we find it. With regard to the writ of certiorari Lord Campbell in *Garton v. Great Western Ry. Co.* (1) stated that "the established practice on the removal of a cause from an inferior Court by certiorari, is that the plaintiff cannot be compelled to declare; whatever may have been the reason for establishing the practice, whether because there is no dies datus or otherwise, it is established that the plaintiff is not bound to follow the cause into the superior Court." That being the law it is quite impossible for us now to interfere with the agreement made by the parties.

With regard to the practice, it is provided by the Judicature Act, 1873, s. 23, that "where no special provision is contained in this Act or in any such rules or orders of the Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts." It has been held in several cases to which I need not refer that where there is no express provision in the rules altering or varying the old practice, that practice remains in force.

The result is that although it may be possible that the defendants did not foresee the result of the course to which they agreed, they nevertheless agreed in such a form that they cannot now compel the plaintiff to go on against his will.

In my judgment the appeal fails and must be dismissed.

(1) 28 L. J. (Q.B.) at p. 105.

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KENNEDY L.J. I am of the same opinion. Nothing to my mind would be more dangerous than that when the parties under excellent advice have agreed to a particular step they should be allowed to go behind the agreement because some consequence of that step was not apparent or because some point was not present to the mind of one of them.

Both according to the well-recognized books of practice and also by the express decision upon which the statement of practice is founded there is no power on the part of the defendants to compel the plaintiff to proceed with the action.

Appeal dismissed.

Solicitors for plaintiff: *Harnett & Co.*

Solicitors for defendants: *Bull & Bull.*

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Feb. 15.

[IN THE COURT OF APPEAL.]

THE KING v. LORD HATHERTON AND ANOTHER, JUSTICES
FOR THE COUNTY OF STAFFORD.

Ex parte GUARDIANS OF THE ORMSKIRK UNION.

Poor Law—Lunacy—Pauper Lunatic sent to Asylum—Expenses of Maintenance—Order for Payment to Managers of Asylum—"Union to which the lunatic is chargeable"—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 286—290.

Where, under s. 287 of the Lunacy Act, 1890, an order for payment to the managers of a county lunatic asylum of certain sums, in respect of the past expenses of maintenance of a pauper lunatic sent from a union to the asylum, was made by justices upon the guardians of another union, who had admitted that the lunatic was chargeable to their union without an adjudication as to the settlement of the lunatic under s. 289 of the before-mentioned Act:—

Held, affirming the decision of a Divisional Court, that the order was rightly made upon the guardians of the last-mentioned union.

ARGUMENT on orders nisi which had been obtained in the Court of Appeal for writs of certiorari to bring up, with a view to quashing them, two orders made respectively by Lord Hatherton and Reginald Hardy, Esq., being two justices of the peace for the

county of Stafford, upon September 23, 1911. The first of those orders was as follows:—

“To the Guardians of the Poor of the Ormskirk Union in the County of Lancaster. Complaint having been made to us the undersigned, two of His Majesty's Justices of the Peace for the county of Stafford, at the County Buildings in the said county of Stafford, by and on behalf of the Committee of Visitors of the Staffordshire County Lunatic Asylum at Burntwood in the county of Stafford, that, in pursuance of a certain order of Joseph Quirke, Esq., a Justice of the Peace for the county of Stafford, dated the 2nd day of September 1908, one Rosabella Buer, a pauper lunatic, (hereinafter called the said pauper lunatic) was on the 2nd day of September 1908 duly conveyed to the asylum for the county of Stafford at Burntwood, and that, at the time of the making of the said order, the said pauper lunatic had a legal settlement in the Ormskirk Union, and that the said pauper lunatic is chargeable to the said Ormskirk Union, and that since the 2nd day of September 1908 up to and including the 14th day of October 1910 the said Committee of Visitors have paid the several sums of money amounting altogether to the sum of 90*l.* 8*s.* 2*d.* for the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum, and that by reason of the special care and treatment required by the state of health and mental condition of the said pauper lunatic the sum of 16*s.* 4½*d.* per week is a reasonable charge for the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum, and the said Committee of Visitors have only received the sum of 57*l.* 3*s.* 8*d.* in respect thereof, Whereupon we the said justices have now duly inquired into the several matters alleged in such complaint, and satisfactory evidence being now given to us thereon, We do hereby adjudge the said complaint and the several recited allegations to be true, and do therefore accordingly order and adjudge you the Guardians of the Poor of the said Ormskirk Union forthwith to pay unto the said Committee of Visitors of the Burntwood Asylum the sum of 33*l.* 4*s.* 6*d.*, the balance of the expenses of the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum from the 2nd day of September 1908 up to

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C. A. and including the 14th day of October 1910. Given under our
1912 hands " &c.

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The said lunatic pauper was, in pursuance of an order of justices, removed on October 14, 1910, from the Burntwood Asylum, which had become overcrowded, to the Staffordshire County Lunatic Asylum at Cheddleton.

The second of the above-mentioned orders, which was made in favour of the committee of visitors of the Cheddleton Asylum, was, *mutatis mutandis*, in terms similar to those of the first above-mentioned order. It recited that complaint had been made that, since October 14, 1910, up to and including August 24, 1911, the committee of visitors of the Cheddleton Asylum had paid the several sums of money amounting altogether to the sum of 37*l.* 0*s.* 1½*d.* for the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum, and that by reason of the special care and treatment required by the state of health and mental condition of the said pauper lunatic the sum of 16*s.* 6*d.* per week was a reasonable charge for the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum, and the said committee of visitors had been repaid the sum of 18*l.* 17*s.* 8½*d.* in respect thereof, and the justices thereby adjudged the said complaint and the said recited allegations to be true, and ordered payment by the guardians of the Ormskirk Union to the committee of visitors of the Cheddleton Asylum of the sum of 18*l.* 2*s.* 5*d.*, the balance of the expenses of the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum from October 14, 1910, up to and including August 24, 1911.

The following facts were stated in the affidavits filed in the case. When the order for removal of the pauper lunatic to the Burntwood Asylum was made, she was living in the parish of Handsworth in the West Bromwich Union, in which her settlement was supposed by the guardians of the union to be. The asylums at Burntwood and Cheddleton were provided by the administrative county of Stafford, and, subject to certain contributions from the county boroughs situate within the county of Stafford, the cost of providing the said asylums was met from the general county lunacy rates which were levied within the whole

of the administrative county of Stafford, including the parish of Handsworth. During the time that the pauper lunatic was in the asylums at Burntwood and Cheddleton the guardians of the West Bromwich Union paid to the committees of visitors of those asylums respectively the sums following: To the visitors of Burntwood Asylum, for the period from September 2, 1908, to September 30, 1909, both dates inclusive, fifty-six weeks and two days at 10s. 6d. per week, 29l. 11s.; for the period from October 1, 1909, to October 14, 1910, both dates inclusive, fifty-four weeks one day at 10s. 2½d. per week, 27l. 12s. 8d. To the visitors of Cheddleton Asylum, for the period from October 15, 1910, to June 30, 1911, both dates inclusive, thirty-seven weeks at 10s. 2½d. per week, 18l. 17s. 8½d. The said sums were paid by the guardians of the West Bromwich Union to the said committees of visitors under s. 283 of the Lunacy Act, 1890, but such sums did not include anything in respect of the lodging accommodation in the said asylums, which was provided by the local authority out of the general county lunacy rate as aforesaid, as the parish of Handsworth contributed its proportion of the cost and expense of such lodging accommodation out of the general county lunacy rates which were levied from time to time in their said area. The total cost to the county for the provision of such lodging accommodation, exclusive of the cost of maintenance and other expenses included in s. 283 of the Lunacy Act, 1890, amounted during the time the said lunatic was in the said asylums to not less than 6s. 2d. per week per patient. No order was made upon the guardians of the West Bromwich Union under the Lunacy Act, 1890, in respect of the expenses of maintenance of the pauper lunatic in the said asylums, but the guardians paid the above-mentioned sums without an order.

In or about July, 1911, it was discovered by the guardians of the West Bromwich Union that the pauper lunatic had at the time of her reception into the asylum at Burntwood a settlement at Southport in the Ormskirk Union, and that during the whole time that she was in the two asylums as above mentioned she was in fact chargeable to that union. On July 26, 1911, the clerk to the guardians of the West Bromwich Union wrote to the clerk to the guardians of the Ormskirk Union stating that the pauper

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C. A. lunatic was settled in Southport in the Ormskirk Union, and that
 1912 he would be obliged if the Ormskirk guardians would "accept the
 REX case without an order of adjudication." The guardians of the
 HATHERTON Ormskirk Union decided to admit that the lunatic was charge-
 (LORD). able to their union, and liability for her maintenance as from
 ORMSKIRK August 4, 1910, without an order of adjudication under s. 289 of
 UNION, the Lunacy Act, 1890. On August 8, 1911, the guardians of the
Ex parte. Ormskirk Union received an account from the guardians of the
 West Bromwich Union for 29*l.* 11*s.* 10*d.*, comprising 26*l.* 10*s.* 10*d.*
 in respect of the maintenance of the pauper lunatic in the
 asylums at Burntwood and Cheddleton during the year ending
 August 4, 1911, and 3*l.* 1*s.* in respect of the examination of her
 and her conveyance to the Burntwood Asylum, and on August 31,
 1911, the guardians of the Ormskirk Union paid this account.
 On August 24, 1911, the pauper lunatic was removed from the
 Cheddleton Asylum to the Lancashire County Lunatic Asylum
 at Lancaster.

On September 19, 1911, the clerk to the guardians of the
 Ormskirk Union received a notice from the clerk to the visiting
 committees of the said asylums stating that he proposed on
 September 23 to apply to two justices at Stafford for orders upon
 the Ormskirk Union under s. 287 of the Lunacy Act, 1890. The
 application was accordingly made, and upon the hearing the
 justices made the above-mentioned orders. The guardians of the
 Ormskirk Union contended that the pauper lunatic was not
 chargeable to the Ormskirk Union within the meaning of s. 287
 of the Lunacy Act, 1890, but that she was chargeable to the
 West Bromwich Union, and that the West Bromwich Union had
 satisfied the charges for the lunatic under that section up to
 June 30, 1911, and that accordingly the justices had no juris-
 diction to make the orders applied for by the visiting committees.
 Application was made to a Divisional Court (Darling J.,
 Hamilton J., and Bankes J.) for orders nisi for writs of certiorari
 to bring up the orders, and refused. (1)

(1) 53 & 54 Vict. c. 5, s. 286: shall be deemed to be chargeable to
 "(1.) Where a pauper lunatic is the union from which he was sent,
 sent to an institution for lunatics, until it has been established, as by
 or where a lunatic in an institution this Act provided, that the lunatic
 for lunatics becomes a pauper, he is settled in some other union, or

Disturnal, for the committees of visitors of the Staffordshire Lunatic Asylums, shewed cause against making the orders for writs of *certiorari* absolute. These orders of justices were rightly made under s. 287 of the Lunacy Act, 1890, upon the

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that it cannot be ascertained in what union the lunatic was settled, and the manager of the institution shall forthwith give to the authority liable for his maintenance notice that the lunatic has become destitute.

“(2.) Every pauper lunatic who is chargeable to a union shall, while he resides in an institution for lunatics, be deemed for the purposes of his settlement to be resident in the union to which he is chargeable.”

Sect. 287: “(1.) The justice by whom any pauper lunatic is sent to any institution for lunatics under this Act, or any two justices of the county or borough in which the institution for lunatics where any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or any two justices, being visitors of such institution, may make an order upon the guardians of the union to which the lunatic is chargeable, for payment to the treasurer, or manager of the institution, of the reasonable charges of the lodging, maintenance, medicine, clothing, and care (in this Act referred to as the expenses of maintenance) of such lunatic:

“(2.) Any such order may be retrospective or prospective, or partly retrospective and partly prospective:

“(3.) An order under this section shall not be subject to appeal.”

Sect. 288: “Any two justices for the county or borough in which an institution for lunatics where a pauper lunatic is or has been confined is situate, or to which

such institution being an asylum wholly or in part belongs, or from any part of which any pauper lunatic is or has been sent for confinement, may at any time inquire into the settlement of the pauper lunatic.”

Sect. 289: “If satisfactory evidence can be obtained as to such settlement in any union, such justices shall, by order, adjudge the settlement, and order the guardians of the union to pay to the guardians of any other union the expenses incurred in or about the examination of the lunatic and the bringing him before a justice or justices, and his removal and conveyance to or from any institution for lunatics (in this Act referred to as the incidental expenses), and all moneys paid by such last mentioned guardians to the treasurer or manager of the institution for the expenses of maintenance of the lunatic, and incurred within twelve months previous to the date of such order, and, if the lunatic is still in confinement, also to pay to the treasurer or manager of the institution the reasonable expenses of the future maintenance of such lunatic.”

Sect. 290, the marginal note of which is “If settlement cannot be ascertained, a pauper lunatic may be made chargeable to a borough or county,” provides for proceedings before justices and the order to be made by them in a case within that section.

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guardians of the Ormskirk Union, to which the pauper was admitted by them to be in fact chargeable. Sect. 286 of the Act, in substance, provides that a pauper lunatic who is sent to a lunatic asylum shall be deemed to be chargeable to the union from which he is sent to the asylum until it is established that he is settled in some other union, or that his settlement cannot be ascertained. Sect. 287 provides for the making of an order for payment to the treasurer or manager of the asylum of reasonable charges for the "expenses of maintenance" of the lunatic therein mentioned upon the guardians of the union to which the lunatic "is chargeable." That section must be construed according to the natural meaning of the words "is chargeable" used in it, and not by reference to s. 286, where the actual settlement of the lunatic is known. It is not reasonable that s. 287 should be construed, not as referring to the union to which by the admission of its guardians the lunatic is in truth chargeable at the time of the making of the order, but as referring to a union to which admittedly the lunatic is not in fact chargeable. In *Committee of Visitors of Glamorgan County Asylum v. Cardiff Guardians* (1) it was held that s. 287 had nothing to do with the average fixed under s. 283 for the weekly expenses of pauper lunatics in an asylum, but was a special provision giving power to a judicial body to direct the payment to the managers of the asylum of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of the particular pauper lunatic. Sect. 287 ought not, therefore, to be construed by reference to s. 286, but according to the plain natural meaning of its words. Assuming that s. 286 must be read with s. 287, the justices had jurisdiction to, and did, adjudge the settlement of the pauper to be in the Ormskirk Union, and therefore it had been established as by the Act provided when the orders were made that the pauper was settled in a union other than West Bromwich, and therefore was not chargeable to the West Bromwich Union.

Sydney Darcy, for the guardians of the Ormskirk Union, in support of the orders for writs of certiorari. The orders of the justices were made without jurisdiction, because the lunatic was not chargeable to the Ormskirk Union for the purposes of s. 287

(1) [1911] 1 K. B. 437.

of the Lunacy Act, 1890. Sects. 286 to 298 of the Act form a fasciculus of sections, dealing with the liability for the expenses of maintenance of pauper lunatics in asylums, which must be read together. By s. 286, when a pauper lunatic has been sent to an asylum, he is to be deemed to be chargeable to the union from which he was sent, *prima facie*, and until it has been established as by the Act provided that he is settled in some other union, or that it cannot be ascertained in what union he is settled. Sect. 288 provides for an inquiry by justices into the settlement of the pauper lunatic. Sect. 289 provides that, upon such inquiry, "if satisfactory evidence can be obtained as to such settlement in any union, such justices shall, by order, adjudge the settlement and order the guardians of the union to pay to the guardians of any other union . . . all moneys paid by such last mentioned guardians to the treasurer or manager of the institution for the expenses of maintenance of the lunatic, and incurred within twelve months previous to the date of such order, and, if the lunatic is still in confinement, also to pay to the treasurer or manager of the institution the reasonable expenses of the future maintenance of such lunatic." Sect. 290 provides for the case in which it is established that it cannot be ascertained in what union the pauper is settled. The effect of s. 286 is that, until an order adjudging the settlement of the pauper lunatic is obtained under s. 289, or it has been established under s. 290 that his settlement cannot be ascertained, he is to be chargeable to the union from which he was sent to the asylum. Neither of the two events mentioned in s. 286, as determining the *prima facie* chargeability of the lunatic to the union from which he was sent, has taken place here. There has been no adjudication of the settlement under s. 289, nor has it been established that the lunatic's settlement cannot be ascertained under s. 290. *Prima facie*, and until her settlement in some other union is established by an adjudication under s. 289 of the Act, the pauper "is chargeable" to the union from which she was sent to the asylum; and, when it has been so established that she is settled in some other union, the guardians of that union could only be ordered to pay the charges of her maintenance during the previous

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C. A. twelve months. Under the former statute relating to pauper lunatics, the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), 1912 s. 96, the section corresponding to s. 287 of the present Act, provided that the order should be made "upon the guardians of the union from which . . . such lunatic is or has been sent" to the asylum, and then followed provisions for adjudication of the settlement, and as to cases where the settlement of the lunatic could not be ascertained, as in the present Act. The scheme of legislation in the present Act, which is in the nature of a consolidation Act, seems to be intended to be the same as in the repealed Act. The justices had no jurisdiction to adjudge the settlement of the lunatic upon the application of the committee of visitors under s. 287. Assuming that they had, the only order as to expenses which they could make as against the guardians of the Ormskirk Union would be an order as to expenses incurred within twelve months previous to the date of the order adjudicating upon the settlement. The expenses of the maintenance of the pauper in the asylum for the previous twelve months had already been satisfied by the guardians of the West Bromwich Union. The case of *Committee of Visitors of Glamorgan County Asylum v. Cardiff Guardians* (1) has no application to the present case. It merely decided that in fixing the amount to be paid under s. 287 the justices were not restricted to the limit of 14s. a week imposed by s. 283 of the Act. [He also cited *Reg. v. Justices of London, Ex parte Edmonton Union* (2); *Reg. v. Bruce*. (3)]

VAUGHAN WILLIAMS L.J. I think that the counsel for the visitors of the Staffordshire County Lunatic Asylums has succeeded in shewing good cause why these orders nisi should not be made absolute. I am not much surprised that the poor law authorities for the Ormskirk Union have found some difficulty with regard to the application of the provisions of the Lunacy Act, 1890, to the circumstances of the present case, for I must say that I do not think that those provisions are as clear as they might be. The substance of the section under which the orders of the justices

(1) [1911] 1 K. B. 437.

(2) (1896) 60 J. P. 456.

(3) [1892] 2 Q. B. 136.

in this case were made existed in earlier legislation, for it is found in the Lunatic Asylums Act, 1853. In s. 96 of that Act we find words that are substantially identical with those of s. 287 of the Lunacy Act, 1890, with this important exception, that, whereas in s. 96 of the earlier Act the words describing the persons on whom the order was to be made were "the guardians of the union or parish or the overseers of the parish (if not in a union or under a board of guardians) from which . . . such lunatic is or has been sent," the words in s. 287 of the present Act have been altered to "the guardians of the union to which the lunatic is chargeable." The effect of the alteration in the language so made may, perhaps, have been a little difficult to appreciate, though in my opinion it has made a very substantial difference in the operation of the Act; and, under the circumstances, I am not surprised that the counsel for the Ormskirk guardians in his argument has made a very stout fight on this question as to the construction of s. 287.

Personally, I do not propose to rest my decision in this case upon the judgments delivered in the Court of Appeal in *Committee of Visitors of Glamorgan County Asylum v. Cardiff Guardians*. (1) In that particular case the question was whether there was any such relation between the provisions of s. 283 and those of s. 287 of the Lunacy Act, 1890, that they must be read together so as to restrict the powers of the justices under the latter section, and the Court held that there was not. The head-note runs thus: "On an application to justices for an order under s. 287 of the Lunacy Act, 1890, for the payment by the guardians of a poor law union of the reasonable charges of the expenses of maintenance of a pauper lunatic in an asylum, the justices have power to fix the amount of the payment to be made by the guardians; and in fixing that amount the justices are not restricted to the limit of 14s. a week imposed by s. 283." In giving judgment Cozens-Hardy M.R. said: "It seems to me that the section plainly does not mean that. It plainly means, as it seems to me, that the justices under this section have not a purely ministerial function: they have a judicial function—a function in the discharge of which they are entitled, and indeed

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bound, to hear evidence, and they are quite entitled to say, and, if their attention is called to the matter, it is their duty to say, 'We have nothing to do with the average weekly cost; we have to deal with the cost of this particular individual lunatic who is brought before us'; and, if they are satisfied that that particular lunatic by reason of the state of his health or other special circumstances costs more than the average, I think it would be entirely wrong for them to decline to go into that question and simply to accept the figures approved by the visiting committee." Fletcher Moulton L.J. said, after referring to the words of s. 283: "When we turn to s. 287 we find a total change of language, which, in my opinion, implies a total change in the intent and object of the section. We have nothing here about weekly sums, but we have here a power given to a judicial body to direct the payment of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of the particular pauper lunatic." I do not think that the Court of Appeal were in that case deciding anything which governs our decision with regard to the relation between ss. 286, 287, 288, 289, and 290 of the Act.

When one looks at the Act, one finds that it is divided into parts, and Part X. of the Act, which begins with s. 283, is headed generally "Expenses of Pauper Lunatics." Sects. 283 and 284 come under the sub-heading "Weekly Expenses"; s. 285 comes under the sub-heading "Medical and other Expenses"; and, when one comes to s. 286, there is a fresh sub-heading, "Liability for Expenses of Maintenance," which covers that and the following sections down to s. 290. I think that this is strong to shew that the powers given and provisions made by that group of sections must be read together as collocated under the heading "Liability for Expenses of Maintenance," and that they are independent of the provision made in s. 283 under the sub-heading "Weekly Expenses."

I will now say what I think as to the meaning of ss. 286 and 287. I am not bound to express any opinion as to the meaning and effect of s. 96 of the Lunatic Asylums Act, 1853, but it appears to me that the change of language in s. 287 of the Act of 1890 is most remarkable; it changes the definition of the union upon the guardians of which the order is to be made from the "union

. . . . from which such lunatic is or has been sent" to "the union to which the lunatic is chargeable." One is bound to consider whether the Legislature did not intend by this change of phraseology some substantial alteration of the provisions of the earlier enactment. I have myself no doubt that they did. I may point out here that the question on this application is as to a wholly retrospective, and not a prospective, order. Therefore I have only to deal with an order of that character, namely, one dealing with past as distinguished from future expenses. As I have said, the sections from s. 286 to s. 290 come under a separate sub-heading from that under which s. 283 and the immediately following sections come, which suggests to me that those sections which come under the sub-heading "Liability for Expenses of Maintenance" are to be read together. I do not, however, think that the decision at which I have arrived in this case is inconsistent with the inference that they should be so read.

I will now read s. 286 of the Lunacy Act, 1890: "Where a pauper lunatic is sent to an institution for lunatics, or where a lunatic in an institution for lunatics becomes a pauper, he shall be deemed to be chargeable to the union from which he was sent." Pausing there for a moment, one cannot help contrasting the words "shall be deemed to be chargeable" with the words "is chargeable" in s. 287. If in fact a lunatic "is chargeable" to a union, there appears to be no necessity or occasion for the application of the words "shall be deemed to be chargeable." Then the section proceeds, "until it has been established, as by this Act provided, that the lunatic is settled in some other union." Apparently the section is there referring to the case in which the settlement is adjudged under s. 289. Then come the words "or that it cannot be ascertained in what union the lunatic was settled," which appear to refer to the provisions of s. 290. It seems to me, therefore, that in the words of s. 286 one finds cogent reasons for saying that the sections 286—290 are to be read together. Sect. 286 deals with two states of things which may possibly arise, the first being that it "has been established, as by this Act provided, that the lunatic is settled in some other union." I cannot doubt that this refers

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to an adjudication of the lunatic's settlement under s. 289. The second state of things is that "it cannot be ascertained in what union the lunatic was settled." Turning to s. 290, I find a marginal note thereto, which in my opinion correctly describes the effect of the section, in the following terms: "If settlement cannot be ascertained, a pauper lunatic may be made chargeable to a borough or county." I am, speaking for myself, convinced that s. 286 is intended to be read in connection with ss. 289 and 290. It is common ground here, I think, that neither of these alternative events mentioned in s. 286 as determining the applicability of the words "shall be deemed to be chargeable to the union from which he was sent" has occurred. There has not been an adjudication of the pauper's settlement under s. 289, nor has it been shewn that her settlement cannot be ascertained. Under such circumstances *prima facie* the intention of s. 286 would appear to be that the pauper should be deemed to be chargeable to the union from which she was sent until one of the two events mentioned in ss. 289 and 290 respectively has occurred, neither of which has occurred in the present case. It may be that, if the words of s. 287 had been the same as those of s. 96 of the Lunatic Asylums Act, 1853, the conclusion contended for by the counsel for the Ormskirk guardians would have been correct. But in s. 287 the words "to which the lunatic is chargeable" are substituted for the words "from which . . . such lunatic is or has been sent." In this case the Ormskirk guardians have admitted that the lunatic is chargeable to their union. Knowing that to be the case, they very properly admitted it without putting the parties to the trouble and expense of obtaining an adjudication. It appears to me that, the moment it is admitted that the lunatic is in fact chargeable to the Ormskirk Union, the case is brought within the words of s. 287, and the justices have jurisdiction to make an order under that section on the guardians of that union. Under those circumstances, whatever difficulty may be suggested in reconciling the introduction of the words "to which the lunatic is chargeable" with the terms of the other sections in this group of sections, these are the words, and the orders made in this case come within them. Sect. 287 goes on to provide that any such order may be retrospective or prospective, or partly one and

partly the other. It is common ground that the order here is retrospective, dealing with expenses already incurred. I think that under the circumstances the orders in this case were rightly made under s. 287, the Ormskirk guardians having admitted that the lunatic was chargeable to their union. If it be said that we are giving no effect to the words of s. 286 "shall be deemed to be chargeable to the union from which he was sent until it has been established as by this Act provided," &c., the answer appears to be that there is no necessity for deeming anything to be the fact when that which actually exists as a fact has been proved, and here we have the admission of the Ormskirk guardians that in point of fact the pauper is chargeable to their union. There is no need, therefore, to deem anything as to the pauper's settlement. For these reasons I think the orders for writs of certiorari must be discharged.

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FARWELL L.J. I agree that the orders nisi must be discharged. I confess that the case does not seem to me to be one of any difficulty. This Court decided in *Committee of Visitors of Glamorgan County Asylum v. Cardiff Guardians* (1), to which I was a party, that s. 287 of the Lunacy Act, 1890, though one of a fasciculus of sections dealing with the expenses of maintenance of a pauper lunatic in an asylum, was so far outside the scope of the other sections that it did not deal with expenses in the ordinary course of such maintenance, but dealt with extra expenses. To use my own phraseology, I said in that case "I agree with the view of the Master of the Rolls that this section deals with the particular case of a particular lunatic in the circumstances in which it comes before the tribunal." The other sections in this fasciculus of sections deal with the ordinary current expenses of the lunatic's maintenance under the Act. This particular section deals with extra expenses, which are to be dealt with by the justices acting judicially, having regard to the evidence and the circumstances of the particular case.

The orders in this case were made by the justices under s. 287. The two orders are in similar terms. Taking the first of them, I find that it orders the guardians of the Ormskirk Union to pay

(1) [1911] 1 K. B. 437.

C. A. 1912 <hr/> REX <i>v.</i> HATHERTON (LORD). ORMSKIRK UNION, <i>Ex parte.</i> <hr/> Farwell L.J.	to the committee of visitors of the Burntwood Asylum the balance of the expenses of the lodging, maintenance, medicine, clothing, and care of the said pauper lunatic in the said asylum from September 2, 1908, up to and including October 14, 1910. It recites that, at the time of the making of the order for the removal of the lunatic to the asylum, she had a legal settlement in the Ormskirk Union, and that she is chargeable to that union, that the committee of visitors have expended sums to the amount of 90 <i>l.</i> 8 <i>s.</i> 2 <i>d.</i> for the lodging, maintenance, medicine, clothing, and care of the said lunatic in the asylum, and that, by reason of the special care and treatment required by the state of health and mental condition of the lunatic, the sum of 16 <i>s.</i> 4½ <i>d.</i> per week is a reasonable charge for the lodging, maintenance, medicine, clothing, and care of the lunatic, and that the committee of visitors have only received the sum of 57 <i>l.</i> 3 <i>s.</i> 8 <i>d.</i> in respect thereof. Therefore, as regards 57 <i>l.</i> 3 <i>s.</i> 8 <i>d.</i> the committee of visitors had received that amount in the ordinary course as expenses of the pauper's maintenance from the guardians of the West Bromwich Union, and what is dealt with by the order under s. 287 is the difference between the amount so received and the total amount of 90 <i>l.</i> 8 <i>s.</i> 2 <i>d.</i> , which difference is claimed under s. 287 by way of special payment under the circumstances of the particular case.
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When I look at s. 287, there seems to me to be no difficulty about the meaning of the words "is chargeable" as used therein. Sect. 286 appears to contemplate a case in which it is doubtful to what union the lunatic is chargeable, and to provide that in such a case the lunatic shall be deemed to be chargeable—that is to say, whether or not he is in fact chargeable, he is to be deemed to be chargeable—to the union from which he is sent to the asylum, for the purpose of maintenance in the interim before it is established to what union he is in truth chargeable, or that it cannot be ascertained to what union he is chargeable. Sect. 287 deals with an order to be made on guardians of a union to which a lunatic in an asylum "is chargeable." Those words would, no doubt, include a case in which a lunatic was to be deemed to be chargeable under the previous section, if it were necessary, but ordinarily speaking they mean "actually chargeable," and in this

case no necessity arises for the application of the words "deemed to be chargeable," because it is admitted that the lunatic is actually chargeable to the Ormskirk Union. It is quite impossible, I think, to adopt the suggestion that we ought to refer back to the terms of the former enactment of 1853 on the same subject, in which the words were "union or parish . . . from which . . . such lunatic is or has been sent," in order to construe the plain phraseology of s. 287 of the Lunacy Act, 1890, in which different words have been substituted for the words of the Act of 1853. I have, I think, already dealt with the suggestion that anything in ss. 288 to 290 affects the present question. Those sections appear to me to deal with expenses of maintenance of the pauper incurred in the ordinary course, while s. 287 deals with the allowance by justices acting judicially of extra expenses in particular cases. Sect. 289 limits the expenses in respect of which the order of justices under that section may order repayment to the guardians of the union from which the lunatic was sent to the asylum by the guardians of the union in which the lunatic's settlement is adjudged to be to expenses incurred within the preceding twelve months. Under s. 287 the order may be retrospective or prospective, or partly one and partly the other, and there is no limit of time as to the past expenses in respect of which it may be made. It was held with regard to the corresponding section of the Lunatic Asylums Act, 1853, in *Finch v. Guardians of York* (1) that an order might be made for repayment of expenses of maintenance of a lunatic for a period of more than twelve months previous to the date of the order. This shews that in that respect the provisions of s. 287 are quite distinct from those of s. 289, and this is quite in accord with the whole scheme and theory of the legislation, having regard to the fact that the expenses contemplated by s. 287 are extra expenses beyond those of ordinary maintenance. These considerations appear to me to dispose of the whole question in this case.

KENNEDY L.J. I am of the same opinion. I desire to add a few words, as I have listened with interest to the very careful argument

(1) (1876) 2 Q. B. D. 15.

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C. A. of the counsel for the Ormskirk guardians, who has urged every
1912 point which could fairly be raised on their behalf. I understand
him to contend that we ought to read s. 287 of the Lunacy Act,
1890, where it uses the words "guardians of the union to which
the lunatic is chargeable," as signifying, if its meaning is fully
developed, "guardians, either of the union from which the
lunatic was sent to the asylum" (and therefore the union to
which under s. 286 the lunatic is to be deemed to be chargeable)
"or of the union to which the lunatic has been adjudged to be
chargeable" by means of the procedure described in s. 289. In
other words, when he spoke of the lunatic as *prima facie* charge-
able to the West Bromwich Union, he was really only putting
part of his case, and he asks us to say that s. 287 must be read
as subject to the provision of s. 286: that s. 286 describes the
only two classes of union upon which an order can be made
under s. 287, namely, a union from which the lunatic was sent
to the asylum, and a union to which he has been adjudged to be
chargeable under s. 289. I agree that s. 287 must be read as
forming one of the fasciculus of sections beginning with s. 286,
which come under the sub-heading "Liability for Expenses of
Maintenance," and I think that the argument which has been
based on that fact is one which required consideration, but I am
none the less of opinion that it ought not to succeed. I do not
think that the words "is chargeable" necessarily refer to what is
dealt with by ss. 289 and 290, but, assuming that one must
read in close connection all the sections included under the
sub-heading, one has still to consider the meaning of the words
"is chargeable" in relation to the facts of this particular
case. As I understand, at the time when these retrospective
orders for expenses were made by the justices for Stafford-
shire, it was admitted by the guardians of the Ormskirk Union
that their union was that to which the lunatic was in fact
chargeable. It would need a great deal more than what I may
call a mere argumentative inference from the connection of the
sections to persuade me that we have a right to go beyond the
fair and natural meaning of the words of s. 287, when once it is
admitted by the guardians of the union who ask us to do so that
the lunatic is in fact chargeable to their union.

I have looked at the affidavits, and, if I read them aright, it appears from them that the Ormskirk guardians did contend that for some reason or other they were not chargeable, or at any rate that no order could be made upon them; and if so, and if the justices did inquire into the settlement, then it would appear that an inquiry did take place as authorized by s. 288, and, in my opinion, speaking for myself, the decision so given by the justices would be sufficient to prevent the argument based on s. 286 from succeeding, even if one had to read into s. 287 all that the counsel for the Ormskirk guardians asks us to read into it. Sect. 289, which, I think, the appellants' counsel sought to utilize for more than it could be properly utilized for, deals with the subject of repayment of expenses as between the guardians of the union from which the lunatic was sent to the asylum and the guardians of the union to which the lunatic is adjudged under that section to be chargeable. The order under s. 287 is an order for payment of expenses to the governors of or those responsible for the management of the asylum. Sect. 289 provides, in effect, that, if there be a contest as between the union from which the lunatic was sent to the asylum and some other union as to the settlement of the lunatic, and an adjudication that the lunatic is settled in the other union, then, in regard to moneys paid by the guardians of the successful union to the treasurer or manager of the asylum within twelve months previously for the maintenance of the lunatic in the asylum, there may be a recovery to that extent by the last-mentioned guardians from the guardians of the unsuccessful union. But the question under s. 287 is not as regards those moneys. The order under s. 287 is for payment of reasonable expenses to the treasurer or manager of the asylum. Even in the view which the counsel for the Ormskirk guardians asks us to take of s. 287, namely, reading into it, as I think he must do, the words "the guardians either of the union from which the lunatic was sent to the asylum" (and therefore the guardians of the union to which the lunatic is to be deemed to be chargeable under s. 286, and therefore *prima facie* liable) "or of the union to which it has been established as provided by this Act that the lunatic is chargeable," I think his

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contention fails in this case, because either by the admission of the Ormskirk guardians, or by adjudication of the justices, each of which would suffice, there was at the time when these orders were made by the justices proof that the West Bromwich Union was no longer within s. 286 the union to which the lunatic was to be deemed to be chargeable, and therefore *prima facie* liable. The justices could not have made under s. 287 an order upon the guardians of the West Bromwich Union, because, whether you take it as admitted, or as found under s. 288, the Ormskirk Union was the union to which the lunatic was in fact chargeable, and by the express words of s. 287, altering as they do the language of the earlier Act of 1853, the question to what union the lunatic "is chargeable" is the matter which the justices have to consider in deciding whether in their discretion they shall make an order for the reasonable expenses which the applicants (not a hostile union, but the managers of the asylum) seek to recover. I think, therefore, while I hope that I fully appreciate the argument addressed to us by the counsel for the Ormskirk guardians, I must agree that the orders *nisi* should be discharged.

Orders discharged.

Solicitors for the committee of visitors of the asylums:
Few & Co., for R. Eustace Joy, Stafford.

Solicitors for the Ormskirk guardians: *Rawle, Johnstone & Co., for Alfred Dickinson, Ormskirk.*

E. L.

GOULD, APPELLANT v. CURTIS (SURVEYOR OF TAXES),
RESPONDENT.1912
Feb. 23.

Revenue—Income Tax—Deductions—Premium on Life Insurance—Sum payable on Death before, and larger Sum if alive on, certain Date—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54.

An insurance whereby, in consideration of an annual premium, 100*l.* is payable on the death of the assured within fifteen years and 200*l.* if he is alive at the end of that period, is an "insurance on his life" within the meaning of s. 54 of the Income Tax Act, 1853, and the assured is entitled to deduct the whole amount of the premium from his assessment to income tax.

CASE stated by Income Tax Commissioners.

Gould appealed against an assessment to income tax made upon him, under Sched. D, for the year ending April 5, 1911, and claimed that he was entitled to a deduction therefrom of 11*l.* 11*s.* 8*d.*, being the whole of the premium paid by him under a policy of assurance dated March 12, 1908.

By the policy, in consideration of an annual premium of 11*l.* 11*s.* 8*d.*, the assurance company covenanted that, if the assured should die before March 1, 1923, they would pay 100*l.* upon his death, or would pay the sum of 200*l.* if he should be living on that day. A policy in that form was called a "double endowment assurance" policy. The form of proposal, which was filled up and signed by Gould for the purpose of effecting this insurance, contained the questions and particulars usual in proposals for ordinary life insurance. The premium was actuarially calculated as on a series of alternative risks dependent on the assured's life, that is to say, the respective chances of the assured's dying before March 1, 1909, and before each subsequent March 1 up to and including 1923, and the premium was calculated in regard to such fifteen chances and on the amounts payable in respect of their respectively happening. The risk was estimated by actuarial calculations based on a recognized table of mortality. The appellant admitted that he took out this policy partly as an investment of money, his main object being to make provision for people if he died.

"Endowment policies," assuring sums payable on and in the

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event of the assured attaining a particular age, no payment being made in case of previous death, had been in use since 1805. About 1840 there first came into use policies under which the right to payment on reaching a certain age was combined with the right to payment on death; under these policies payment was to be made either (a) at a particular date or on the previous death, or (b) on attaining a particular age or on the previous death. This kind of assurance constitutes more than one-half of the business (other than industrial assurance) of some of the life assurance companies.

Where under such policies the same sum was payable at death or at the alternative time therein mentioned, a deduction for the purposes of assessment to income tax, under s. 54 of the Income Tax Act, 1853 (1), equal to the whole premium, but not exceeding one-sixth of the income, was invariably allowed, but only as a concession and without any admission of legal right except as to such part of the premium as would be applicable to the sum payable at death.

The surveyor of taxes did not object to a deduction in respect of so much of the premium as was attributable to the sum payable on death before March 1, 1923, but contended that, as to the alternative amount payable if the assured was alive on March 1, 1923, the insurance was not an "insurance on his life" within the meaning of s. 54. (1)

The Commissioners decided that the policy was not only a policy of life insurance, but also a contract for an investment, and that part only of the premium was applicable to the life insurance risk; and that only that part of the premium could be deducted, the amount being a matter for actuarial calculation.

(1) 16 & 17 Vict. c. 34, s. 54: of which he shall be liable to be assessed under either of the schedules (D) or (E) of this Act Provided always that no such abatement allowance or repayment as aforesaid shall be made in respect of any such annual premium beyond one-sixth part of the whole amount of the profits or gains of such person so chargeable as aforesaid"

"Any person who shall have made insurance on his life or shall have contracted for any deferred annuity on his own life in or with any insurance company which shall become registered shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contract from any profits or gains in respect

Danckwerts, K.C., and *Rowlatt*, for the appellant. This insurance was wholly an "insurance on his life," within the meaning of s. 54 of the Income Tax, 1853. In either alternative it was an insurance on the continuance of life. In the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), which was passed to enable assignees of policies of life assurance to sue in their own names, "policy of life assurance" is defined, by s. 7, to mean "any instrument by which the payment of monies . . . on the happening of any contingency depending on the duration of human life is assured or secured"; by s. 98 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), "policy of life insurance" is defined to mean "a policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives"; and by s. 30 of the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), "policy on human life" is defined to mean "any instrument by which the payment of money is assured on death or the happening of any contingency dependent on human life." The whole assurance in the present case clearly comes within those definitions, which are all founded upon the principle that a policy of life assurance is one which depends upon human life or upon any contingency depending upon human life. There is nothing in the words of the Income Tax Act, 1853, or in the policy of the Act, to exclude such an insurance as this. In *Prudential Insurance Co. v. Inland Revenue Commissioners* (1) Channell J. held that this kind of insurance was a "policy of life assurance" within the meaning of s. 98 of the Stamp Act, 1891. Endowment policies, providing only for a payment if the assured attained a certain age, had been in use for fifty years, and double endowment policies such as this for twelve years, when s. 54 was enacted, and it must be assumed that the Legislature was then well aware of the existence of this kind of insurance and would have taken care to exclude it from the benefit of the enactment if it had so intended. [They referred to 14 Geo. 3, c. 48; *Godsall v. Boldero* (2); *Dalby v. India and London Life Assurance Co.* (3)].

Sir John Simon, S.-G., and *W. Finlay*, for the respondent.

(1) [1904] 2 K. B. 658.

(2) (1807) 9 East, 72.

(3) (1854) 15 C. B. 365.

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All the definitions which have been quoted from other statutes are contained in statutes passed for a different purpose and are definitions only for the purposes of those statutes. They are wide definitions for the purpose of including contracts which could not otherwise properly be called contracts of life insurance. Sect. 54 of the Income Tax Act, 1853, contains its own definition, which is "insurance on his life," a much narrower definition than those in the other Acts referred to. The contention of the appellant must go the length of saying that a contract, in consideration of an annual payment, simply to pay a lump sum if the assured is alive at the end of a certain number of years, is within s. 54. That is clearly not an insurance on life in the ordinary sense. In this policy, one alternative is the contingency of the assured dying and the other the contingency of his living; it is, therefore, partly an insurance on life and partly on death, for one indivisible premium. If this is an "insurance on his life" within the meaning of s. 54, then the express provision as to deferred annuities would be quite superfluous, for a contract for a "deferred annuity on his own life" would be an "insurance on his life." The decision in *Prudential Insurance Co. v. Inland Revenue Commissioners* (1) depended entirely upon the wide definition in s. 98 of the Stamp Act, 1891.

Under s. 54 the assured is only entitled to deduct the amount of the premium if he shews that it is paid in respect of one or both of the alternatives stated in the section; and he does not shew that if the premium is partly paid in respect of a contract which is not one of insurance on his life. Therefore he is not entitled in such a case as this to deduct any part of the premium, though the Crown does not take that objection in the present case.

It would be contrary to the policy of the Act to allow the deduction in such a case as this. A sum payable on death, or deferred annuities, would be liable to duty as soon as paid; but a sum paid when the assured attains a certain age would or might escape duty altogether, for the assured could spend it all or remove it and himself from the country before his death.

The definition of life insurance given by Parke B. in *Dalby v.*

(1) [1904] 2 K. B. 658.

India and London Life Assurance Co. (1) exactly applies and supports the contention of the Crown; it is as follows: "The contract commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable."

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Danckwerts, K.C., in reply. In *Bunyon on Life Insurance*, 2nd ed., p. 1, this definition is given: "The contract of life assurance may be further defined to be that by which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments."

HAMILTON J. In this case Gould appeals from the refusal of the Commissioners to allow a deduction for his life insurance premium under s. 54 of the Income Tax Act, 1853, and the whole question really depends upon the true construction of that section. The appellant effected a policy, which is called a double endowment assurance policy, on his own life, under which he had to pay an annual premium of 11*l.* 11*s.* 8*d.*; and the sum assured was 200*l.* payable at the expiration of fifteen years if the assured was then living, or 100*l.* payable on previous death, without profits. The proposal is in form similar to proposals in ordinary life assurance business. It begins by requiring the name of the life to be assured and particulars about the assured in considerable detail. The case finds that "the premium was actuarially calculated as on a series of alternative risks dependent on the assured's life, that is to say, the respective chances of the assured's dying before the 1st of March, 1909, and before each subsequent 1st of March up to and including the 1st March, 1923, and the premium was calculated in regard to such fifteen chances and on the amounts payable in respect of their respectively happening." Evidently, therefore, the premium was arrived at

(1) 15 C. B. 365, 387.

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solely with reference to the chance of the continuance of the assured's life, for a greater or shorter period. Observations, which might be very germane if the policy had combined with that chance the chance of some other life or lives continuing, or some other event or events happening, do not arise in the present case.

The case further finds that the appellant "admitted that he took out this policy partly as an investment of money, his main object being to make provision for people if he died." In a sense life insurance is always an investment of money, for it enables those who have not opportunities of making profitable investments out of their savings and have not very great opportunities of making savings at all to secure an ultimate fund, which if left to themselves they would have found beyond their means.

The case further finds that instruments commonly known as endowment policies, assuring sums payable on and in the event of the assured attaining a particular age, no payment being made in case of previous death (except in certain cases a return of the whole or part of the premiums), have been in use since 1805. About 1840 there first came into use policies under which the right to payment on reaching a certain age is combined with the right to payment on death. This kind of assurance constitutes more than one-half of the business (other than industrial assurance) in some of the life assurance companies at the present time.

The point, therefore, is one of considerable general importance, and one which might well have been specifically before the mind of the Legislature in 1853, at which time endowment policies making the payment of an amount dependent on the continuance of a life had been in use for nearly fifty years, and policies combining the payment of a sum if life continued with payment of a sum if life determined had been in use for over ten years. The words of the section, so far as material, are these: "Any person who shall have made insurance on his life . . . or shall have contracted for any deferred annuity on his own life."

I do not think that I could safely place reliance on arguments drawn from the analogy of some of the Acts which were cited to me, particularly the Stamp Act of 1891 (54 & 55 Vict. c. 39),

and the Assurance Companies Act of 1909 (9 Edw. 7, c. 49). They do not appear to me to be sufficiently in *pari materia* to afford guidance; and the nature of life insurance, and also the kind of insurance on life referred to in the Act, may be quite sufficiently gathered from one's general knowledge of the business of life insurance.

It is to be noticed that the Act of 1853 makes no attempt to define insurance or annuity, and presumably therefore the words are used in the sense in which, among persons conversant with insurance, they would have been used in 1853. I think that observation in itself goes far to meet the point made upon the passage quoted from the judgment of Parke B. in *Dalby v. India and London Life Assurance Co.* (1) Parke B. was not there purporting to define the term "life assurance" or insurance on a life. It was not necessary that he should endeavour to do so; it was not even necessary that he should determine all the essential features of such a contract. What was material was that he should point out one essential feature for the purpose of contrasting it with other classes of insurance, fire and marine insurance and other contracts of indemnity, which was the point in question before the Court on that occasion. If one considers the object of the Legislature with regard to s. 54, there can be no doubt that it endeavoured to assist and perhaps to encourage a prudent form of family provision for the future. It specified no less than four ways in which at that time a man with persons dependent upon him, particularly wife and children, might make provision for them. One was insurance on his life, one was a contract for a deferred annuity on his life, one was an annual payment under an Act of Parliament in order to secure a deferred annuity to his widow or provision for his children after his death, and one was the suffering of an annual deduction from his stipend under an Act of Parliament for the like purpose. As in every case, subject to the limitation to a proportion of the whole of his profits or gains, he was to be entitled to deduct the payments or deductions thus made or suffered, it seems obvious that the object of this section was to deal tenderly with persons making the class of provision

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(1) 15 C. B. 365, 387.

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for the future which was viewed by the Legislature with sympathy and approval.

It is conceded that if the argument of the Crown is right, one form of provision, meritorious in itself and of considerable standing at the time when the Act was passed, has been omitted altogether. If insurance on life to secure payment of a sum at death is the only kind of "insurance" contemplated, then, as a contract with an insurance company for a deferred payment of a lump sum to the assured himself is not within the words "contract for any deferred annuity," nor within any of the other words of the section, it is left out of the protection and assistance which this section is in general framed to give. The only reason which could be suggested in argument for that omission is that those who framed the section may have had it in mind that the capital sum paid at death, and a deferred annuity received during the later years of life, would both of them eventually become chargeable to one form of duty or another, and therefore the deductions in *præsenti* would not altogether escape, but would become liable in another shape in *futuro*; whereas to allow deductions in *præsenti* where a lump sum might be paid to the assured at a later date would give him an opportunity of lavishing it, or otherwise withdrawing it and himself from the reach of the revenue, which would of course from the point of view of this statute deprive such form of saving of any meritorious character. If I may borrow respectfully an adjective used by Lord Macnaghten in *London County Council v. Attorney-General* (1), I should describe that argument as "whimsical." The strength of the contention for the Crown seems to me to be one of construction and of construction only. It is this: If this double endowment assurance is within the words "insurance on his life," it must be so because that part of it which consists of a contract for payment to the assured himself at a later date is within the description of "insurance on his life," and because "insurance on his life" extends to contractual provisions the enjoyment of which will be dependent upon the continuance of his own life; and, if that is true, what need was there to have added "or shall

(1) [1901] A. C. 26, 40.

have contracted for any deferred annuity on his own life," seeing that that also would be within the contractual provision for a benefit to himself dependent upon the continuance of his own life, which it is contended that "insurance on his life" means? I think the argument is a very forcible one. But to my mind the considerations to which I have already alluded, as to the existing practice in insurance in 1853, and as to the object with which the benefits of s. 54 were conferred upon the subject, are reasons sufficient for thinking that s. 54 ought not to be construed in this grammatically precise manner. "Insurance on his life," if it had been intended to be a scientifically exact expression, would, I should have thought, have been defined by the statute, and, if it had been intended to use it in any other sense than that of common parlance among such persons as were conversant with insurance at the time, it would be necessary to give it some precise definition; whereas, on the assumption which I make that "insurance" and "annuity" are words not of scientific law but of common business, there is no inherent necessity for adopting them in senses which would be mutually exclusive the one of the other. It does not seem to me that a contract necessarily ceases to be an insurance on a man's life because, as part of the benefits, he is to receive either an annuity or a lump sum at a deferred time, as an alternative to the payment to his legal personal representatives of the capital moneys when his life drops.

The nature of this contract certainly seems to me to be one which makes the provisions for endowment ancillary to the life insurance. The range over which the premiums can be calculated is very extensive, and if the original form of insurance to pay a sum of money at death were extended by quite easy stages, one would arrive at such an arrangement as the present without any one being able to say that, properly considered, the contract was anything but an insurance on life. An insurance might in the first instance be to pay at death, the simplest possible form. I see no reason why it should not equally be an insurance on life if the contract was to pay twelve months after the death. The event insured is the death of the assured. If, then, for the purpose of either relieving the insurance company,

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or the assured, or both, the arrangement is made that in some event there is to be a payment before death, while in other events including the death there is to be a payment on death, it still remains an insurance on the life. In this particular case the effect of the contract is this : In consideration of annual premiums, the dropping of the life at any time within fifteen years is insured, and there is an insurance on his life ; after the fifteen years he pays no more premiums, and therefore before that date he is paying higher premiums than would otherwise have been the case. To counterbalance that the insurance company will pay him, without waiting for the dropping of the life, a larger sum at the end of fifteen years, and so end the matter. It seems to me to be in substance still an insurance on his life, dependent in every aspect upon his life and upon the continuance of his life ; and the words are "insurance on his life," not "insurance against his death," which leads to the conclusion that within those words may certainly be included this contract which does create an insurance on his life although it is modified by a contract to pay a considerable lump sum before death occurs.

That being my view, I think that the policy was one in respect of which the appellant was entitled to make the deduction. I need only say a word or two about another point. The Solicitor-General pointed out that it might be contended that, as the taxpayer's claim was a claim to deduct or to pay less than he was chargeable to under the charging sections, the whole burden of bringing himself within this section rested upon him, and that, if the words "insurance on his life" meant only that part of this endowment assurance which provided for payment at death, then he might be precluded from claiming even such an apportioned part of his premium by way of deduction as would be appropriate to that part of his contract, because he would not be able to bring himself within the section by altering his contract and ascertaining what he would have had to pay for part of its benefit if that had been provided for as a separate contract. He disclaimed any intention of raising that point upon this occasion, reserving of course his right to raise it upon another occasion should it be material. In the view which I

take of the meaning of s. 54, it is unnecessary to decide it. I only wish to say that I should require more argument to convince me either that the burden rested on the taxpayer to discriminate the premiums attributable to these two different classes of benefit, or that, assuming the burden rested on the Crown, the taxpayer would be any the less entitled to deduct the annual premium for such an insurance, which is an insurance on his life, because it happens to include other matters besides an insurance for a sum payable only on his death.

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Appeal allowed.

Solicitor for appellant: *A. E. Pratt.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. H. W.

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Licensing Acts—Transfer of Licence—Old Beer-house Licence—Transferee—“Fit and proper person”—Agreement between proposed Transferee and Brewers—Jurisdiction of Justices—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23, sub-s. 2 (b).

Licensing justices have jurisdiction under s. 23, sub-s. 2 (b), of the Licensing (Consolidation) Act, 1910, to consider, upon an application for the transfer of an old beer-house licence, whether the proposed transferee is a fit and proper person to be the holder of the licence.

In the exercise of that jurisdiction the justices have no power to attempt to regulate the terms upon which the applicant is to conduct his business if those terms do not in any proper sense affect his fitness to hold the licence. But the justices may properly come to the conclusion that the applicant is not a fit and proper person to hold the licence if the terms upon which he intends to carry on his business, either as between himself and his landlord or as between himself and the public, are such that the only legitimate inference from a consideration of those terms is that the applicant cannot carry on his business without infringing the law.

RULE NISI obtained at the instance of one Joseph Atherton calling upon the repondents, certain justices for the borough of Hyde in the county of Chester, to shew cause why a writ of mandamus should not issue commanding them or some of them to hold a transfer sessions and at such transfer sessions to proceed to hear

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and determine pursuant to the statutes in that behalf an application by Atherton for the transfer to him of a licence formerly held by one James Sidebotham in respect of the house and premises known as the "Mechanic's Arms," situate in the borough of Hyde, enabling him to hold excise licences to sell by retail beer or cider to be consumed on the premises. The grounds upon which the rule was obtained were that the justices had refused the application upon grounds not within their jurisdiction, and that they had taken into consideration matters which were not within their jurisdiction.

It appeared from an affidavit made by certain of the licensing justices in opposition to the rule that the licence in respect of the "Mechanic's Arms" was an ante-1869 beer on licence, the owners of the premises being Messrs. Walker & Homphrays, Limited, a firm of brewers of Salford.

On July 6, 1911, an application was made to the licensing justices by Atherton for a protection order enabling him to sell by retail beer or cider to be consumed on the licensed premises known as the "Mechanic's Arms" until the then next ensuing special transfer sessions to be held on August 10, 1911. That application was granted. On August 10, 1911, an application was made by Atherton for the transfer to him of the licence of the "Mechanic's Arms" from Sidebotham, the then holder of the licence. A draft of a proposed agreement of tenancy between the brewers and the applicant had been previously forwarded in accordance with the practice to the clerk to the justices. The latter reported to the justices the terms of this agreement. The applicant was examined on oath by the licensing justices as to his position with the brewers and as to his interest in the premises. The justices were not satisfied, and adjourned the hearing of the application to the special sessions to be held on September 28, 1911.

The proposed agreement contained (inter alia) the following clauses:—

By clause 2, paragraph 9, the applicant agreed with the brewers "not at any time during or upon or after the expiration of this tenancy to demand or require directly or indirectly any moneys in consideration of goodwill for the trade of the said house and

premises it being expressly agreed that the tenant shall have no claim upon the landlords in respect of any increase of business which may take place during his tenancy."

Clause 4, paragraph 1 (e), provided that—(e) "If any notice or complaint shall be given or made by any justice of the peace or by the superintendent or acting superintendent for the time being of the local police force as to the conduct or management of the said premises" the tenancy might be determined by the brewers at any time without notice.

The agreement contained the following schedule :

"SCHEDULE OF PRICES.

XXX Ale	37/- nett.
Pale Ale	47/- „
WWp.	37/- „
C. Beer	39/- „
XXXXX	65/- „

On September 27, 1911, the clerk to the justices returned to the applicant's solicitor the proposed agreement which had been submitted to the justices, having indicated thereon in pencil such alterations as were usually required by the justices. With the draft he sent a letter with a note appended thereto which (so far as material) was in the following terms:—"Judging from the schedule and one or two clauses in the agreement the justices think you are proposing to introduce a new system in Hyde. The justices regard with disfavour your advertisements that 6d. beer is to be sold at 2d. per glass or pint."

At the special sessions held on September 28, 1911, the applicant informed the justices that he had never kept a licensed house and that he had previously been a cellarman in the employ of the brewers; that he had deposited 50*l.* with the brewers as a guarantee for proper conduct of the house, and that he had no other means; that he was charged 26*l.* a year rent, but that the rates were to be paid by the brewers; that the goodwill, fixtures, and effects of the business belonged to the brewers; that he understood that the outgoing tenant had received from the brewers 160*l.* for the goodwill, fixtures, and effects of the business without the stock of liquors; that he had paid nothing to the

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outgoing tenant and had had no negotiation with him; that he had had no advice as to the effect of the proposed agreement, but had read it and understood it; that he was compelled to buy all his stock from the brewers; that the cheapest beer he could purchase cost 37s. a barrel, and that he was compelled to retail this quality of beer at 2d. per pint in competition with all other licensees who were selling a similar quality of beer at 3d. per pint; that practically the whole business of the house was the sale of beer of this quality; that the beer sold by other licensees in the district at 2d. per pint was purchased by them at from 27s. to 28s. per barrel; that he had no voice in the regulation of the price to be charged to his customers. He further stated that he would have a balance of 3l. a week on the trade he was doing, out of which he would have to pay rent, wages of servant, excise duties, and other outgoings, but he was unable to shew the justices how the amount of 3l. a week was arrived at. He was also taken through various clauses in the proposed agreement, and it was ascertained that he was not aware of many of the provisions it contained. The justices intimated generally that they were satisfied that the applicant was not a bona fide tenant and that he was not a fit and proper person to hold a licence, and that he would be unable under the conditions imposed to properly carry on the business. On the application of the applicant's solicitor the justices agreed to adjourn the hearing of the application until the then next transfer day to enable the applicant and the brewers to consider the position.

On November 23, 1911, the application was renewed, and on behalf of the applicant it was contended by counsel that, as the licence was an ante-1869 on beer licence, the justices were, in considering whether they would allow or refuse the transfer, confined to the specific grounds mentioned in the second part of the Second Schedule to the Licensing (Consolidation) Act, 1910; that they could not require the production of the agreement between the brewers and the applicant, as s. 25, sub-s. 2, of the Licensing (Consolidation) Act, 1910, did not apply to old beer on licences; that the justices could not interfere with the conditions between the brewers and the tenant; and that the justices had no right to inquire whether

the applicant was a fit and proper person to hold the licence. No agreement was tendered to the justices on this occasion. The justices further stated in their affidavit that the proposed agreement contained clauses to which they objected, and that at the hearing of September 28, 1911, they indicated generally in what respects they wished to have it amended. As examples, they wished to have clause 2, paragraph 9, and clause 4, paragraph 1 (*e*), deleted, but they did not give instructions for the preparation of any particular clauses, and at the hearing of November 23, 1911, they informed counsel that it was open to him to submit any alterations for their consideration which would carry out their views. The agreement, however, was not the sole or even the chief ground of refusal.

In dealing with the application the justices found as facts (1.) that the applicant was not duly qualified as by law is required; (2.) that the applicant was not a bona fide tenant and was not a fit and proper person to hold the licence; (3.) that the terms of the agreement of tenancy submitted to the justices were such that the applicant could not properly carry on the business of the licensed premises, and that his interest was such as to render him indifferent whether he conducted the premises or not.

The justices considered that it was their duty to inquire whether the applicant was a fit and proper person to hold the licence in accordance with s. 23, sub-s. 2 (*b*), of the Licensing (Consolidation) Act, 1910, and to inquire into the conditions of tenancy under s. 25, sub-s. 2, of the Act (1), and refused the application.

J. Sankey, K.C., and *R. M. Montgomery*, in support of the rule. The justices exceeded their jurisdiction in taking into consideration the terms of the agreement between the applicant and the brewers. They could only refuse the application for the transfer of the licence upon one of the four grounds mentioned in head A of the second part of the Second Schedule to the Licensing (Consolidation) Act, 1910. The provision in s. 1 of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1, requiring the premises in respect of which a beer retailer's licence is granted

(1) See note on p. 666, post.

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to be a dwelling-house and the holder of the licence to be the real resident holder and occupier of the premises are repealed by s. 2 of the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35). There is therefore no objection to the applicant personally so far as that section of the Beerhouse Act, 1840, is concerned. As to the Licensing (Consolidation) Act, 1910, personal disqualifications for the purposes of the Act are enumerated in s. 35 of that Act. None of those disqualifications apply to the applicant, and he is therefore duly qualified by law within the meaning of the second part of the Second Schedule, head A, clause 4, of the Licensing (Consolidation) Act, 1910. The judgment of Wills J. in *Reg. v. Cotham* (1) shews that, as the justices have taken into consideration matter outside the ambit of their jurisdiction, a mandamus ought to be granted even though they have also considered other matters which are within their jurisdiction. The effect of s. 18, sub-s. 1, and s. 23, sub-s. 2, clause (c), is that the justices had no power to refuse the application upon the ground that they objected to the terms of the agreement, as that is not one of the four grounds specified in the second part of the Second Schedule to the Act. They ought to have referred it to the compensation authority in accordance with the provision contained in s. 18, sub-s. 1. Upon an application for the transfer of an old on beer licence the justices cannot take into consideration the question whether the proposed transferee is a fit and proper person within the meaning of s. 23, sub-s. 2, clause (b), for clause (c) confines the matters which they can take into consideration to the four grounds specified in head A of the second part of the Second Schedule. The inquiry would be germane under clause 2 of head B in the case of other old on licences.

Moreover, on the facts there was no evidence before the justices that the applicant was not a fit and proper person. There is nothing in the agreement between the applicant and the brewers which makes him not a fit and proper person to take the transfer of the licence. If the decision of the justices is upheld it will enable them to regulate the sale of beer. The provisions contained in clauses (a) and (b) of sub-s. 2 of s. 23 of the Licensing (Consolidation) Act, 1910, are not new. Clause (a) and the

(1) [1898] 1 Q. B. 802.

Fourth Schedule to the Act of 1910, which enumerates the occasions upon which the transfer of a licence may take place, reproduce s. 14 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), and clause (b) was included in s. 4 of the Act of 1828. In the case of any old on licence other than an old beer-house licence the fitness of the applicant has to be considered under clause 2 of head B of the second part of the Second Schedule, but to take it into consideration in the case of an old beer-house licence would be to add a fifth ground to the four grounds stated in head A.

The fitness of the applicant to hold a licence must have been considered by the justices under s. 88, sub-s. 1, when they granted him the protection order. It is therefore clear that when they refused to grant the application for the transfer they must have taken additional matters into consideration. The judgment in *Reg. v. Lancaster Justices* (1) shews that the terms of the agreement are no part of the personal fitness of the applicant. The Licensing (Consolidation) Act, 1910, is a consolidating statute except upon certain points not material to the present case. The four grounds mentioned in head A of the second part of the Second Schedule are transferred from s. 8 of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 27). The words "fit and proper person" in s. 23, sub-s. 2, clause (b), if they apply, must be read as meaning that the applicant is a fit and proper person according to the old law. The personal disqualifications under the old law are reproduced in s. 35 of the Licensing (Consolidation) Act, 1910.

The respondents made an affidavit as to the facts but did not appear.

LORD ALVERSTONE C.J. In this case I do not intend to decide anything more than is necessary to deal with the material contentions, although the arguments introduced rather larger questions. An application was made to the justices by Atherton for the transfer to him of an ante-1869 beer-house licence. There are certain limits to the matters which may be inquired into by the justices when dealing with such a licence, either by way of renewal or transfer. The Licensing (Consolidation) Act, 1910,

(1) (1891) 7 Times L. R. 428.

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It was contended in support of the rule nisi that, under s. 18, sub-s. 1, of the Licensing (Consolidation) Act, 1910, if any question arises as to whether the person who applies for the renewal or the transfer of an old beer-house licence is a fit and proper person to be the holder of the licence, the justices have no jurisdiction to inquire into that question, and that the jurisdiction to make the inquiry is vested in the compensation authority. I cannot assent to that contention. I cannot conceive that the Legislature could have intended that if the only reason for refusing a renewal or transfer is that the applicant is not a fit and proper person, that that should be a ground for taking away the licence and compensating the licence holder. It seems to me that that result would be in contradiction to the whole spirit of the statute. In my judgment, therefore, it was never intended that the question as to the fitness of the person applying for a renewal or transfer should be referred to the compensation authority.

Sect. 23, sub-s. 1, says that for the purposes of the Act the transfer of a justices' licence is the grant of a justices' licence to one person in substitution for another person, and sub-s. 2 says that "An application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows:—(a) A transfer can only be authorised in the cases mentioned in the first column of the Fourth Schedule to this Act and to the persons set opposite thereto respectively in the second column of that schedule." It is not seriously disputed that the Fourth Schedule applies. It enumerates certain events each of which is (as has very aptly been said in argument) an occasion for the transfer of the

licence, the occasion being death, incapacity, bankruptcy, occupation of premises given up, and two other cases to which I need not refer. In the four cases respectively to which I have referred the transfer may be granted to the representatives, the assign, the trustee, and the new tenant or occupier, or (which is immaterial to the present case) the person to whom the interest has been sold. It is therefore clear that s. 23, sub-s. 2 (a), and the Fourth Schedule, which reproduces the enumeration contained in ss. 4 and 14 of the Alehouse Act, 1828, of the persons to whom transfers may be granted, apply to the present case.

Clause (b) of s. 23, sub-s. 2, says that "The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence in addition to being a person to whom a transfer can be authorised under the foregoing provision." Common sense seems to suggest that at least the justices ought to satisfy themselves that the proposed transferee is a proper person; and, subject to there being a distinction between ante and post 1869 licences from the point of view of character of the applicant, it seems to me that that clause must apply where there is an application for the transfer of a licence. I am therefore unable to accept the contention that the justices dealing with transfer or renewal have nothing to do with the question as to whether the applicant is a fit and proper person. In my judgment, therefore, it was not intended by the enactment contained in s. 18 that the question whether the applicant is a fit and proper person should be referred to the compensation authority.

Clause (c) of s. 23, sub-s. 2, contains a re-enactment of the provisions with regard to old on licences. It says: "The special provisions of this Act affecting the renewal of an old on licence shall apply to the transfer of an old on licence as they apply to the renewal." That clause makes it necessary to refer to the second part of the Second Schedule. The grounds upon which the renewal of old beer-house licences can be refused by the justices are mentioned under the head A, clauses 1, 2, 3 and 4, in the second part of the Second Schedule; and those clauses were contained in s. 8 of the Wine and Beerhouse Act, 1869. Those

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clauses are therefore consolidating clauses and keep alive those grounds, limited as they were. They are certainly narrower than those specified in head B of the second part of the Second Schedule. I can see nothing in the grounds specified in the second part of the Second Schedule, which are re-enacted by clause (c) of s. 23, sub-s. 2, inconsistent with the view that under clause (b) of that sub-section the question whether the transferee is a fit and proper person is intended to be inquired into by the justices. The reason why clause 1 is inserted in head A of the second part of the Second Schedule is that the ground there specified with regard to good character is rather narrower than that contained in clause 2 of head B with respect to old on licences other than beer-house licences. Clause 4 of head A of the second part of the Second Schedule specifies the ground "that the applicant, or the house in respect of which he applies, is not duly qualified as by law is required." In my view, what I may call the fitness and propriety of the applicant is not intended to be brought in under that clause, but it refers to qualifications or disqualifications which are by law required in order that a person may hold a licence. It would not affect the conclusion at which I have arrived if I thought that the words "on the ground that the applicant is not duly qualified as by law is required" did include the consideration of the fitness and propriety of the applicant, because clause (b) of s. 23, sub-s. 2, may be said to contain a qualification by law, namely that the applicant must be a fit and proper person. But whichever construction is placed upon clause 4 of head A of the second part of the Second Schedule, there is nothing in that clause inconsistent with the justices considering under s. 23, sub-s. 2, clause (b), the question whether the applicant is a fit and proper person.

The corresponding specified grounds mentioned in clause 2 of head B of the second part of the Second Schedule with regard to old on licences other than old beer-house licences are rather wider, because the clause contains the words "grounds connected with the character or fitness of the proposed holder of the licence." That clause is a re-enactment of the provision contained in s. 1, sub-s. 1, of the Licensing Act, 1904 (4 Edw. 7, c. 23). The result is that s. 23

of the Licensing (Consolidation) Act, 1910, although not quite consolidation only, in substance keeps alive the old conditions with respect to the different classes of licences. In my judgment the question whether the applicant is a fit and proper person is one for the licensing justices in regard to all classes of old on licences described in the first part of the Second Schedule of the Licensing (Consolidation) Act, 1910.

One other point has been mentioned in argument as to which I express no opinion, as it does not bear upon the question before us. The point is (and it may be raised hereafter) what is the effect of the repeal by s. 2 of the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35) of the words "to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted" in s. 1 of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61). The Finance Act, 1910, was passed after (although I do not think that fact is very material) the Licensing (Consolidation) Act, 1910. I do not express any opinion as to what is the result of that repeal. It is obvious that it may give rise to important questions, and it would seem at first sight to have abolished the necessity for residence on the part of the holder of the licence. The question does not arise in the present case, because no point of that kind was raised as an objection before the justices, and the excision of those words from the Act of 1840 by the operation of the Finance Act, 1910, cannot be used as an objection to the rule being made absolute. I therefore do not propose to further consider what the true effect of that excision may be.

Having endeavoured to express my view of the law, I have now to consider the facts of this particular case. It is clear that the justices in inquiring into the question whether the applicant was a "fit and proper person" to be the holder of the licence took into consideration the terms of the agreement under which he was holding the premises. The grounds upon which the justices refused the application were that the applicant was not duly qualified, that he was not a bona fide tenant, that the terms of tenancy were such that he could not properly carry on the business of the licensed premises, and that his interest was such as to render him indifferent whether he conducted the

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premises properly or not. But the *prima facie* meaning of the words "fit and proper person" in s. 23, sub-s. 2, clause (b) of the Licensing (Consolidation) Act, 1910, and also of the specified ground of failure "to produce satisfactory evidence of good character" in head A, clause 1, of the second part of the Second Schedule, is that the applicant must be a fit and proper person to hold a licence and carry on the business of the licence holder. They do not mean that there is to be an inquiry into the special financial terms or the special arrangement as to the method in which the trade is going to be conducted. I am satisfied from the justices' affidavit that they did in substance take into consideration the question of the price of the beer which was to be supplied to the applicant, and how far he would succeed in making a profit, as well as the question whether the beer supplied to him was not too expensive a beer, and that in other ways they went much further than the consideration of the question whether the applicant was personally a fit and proper person to hold the licence. In dealing with the question whether they should grant or refuse the transfer they considered the business terms as between the brewer and the licence holder. That, in my judgment, goes a great deal further than inquiring in the case of an old on licence whether an applicant is "a fit and proper person" to be the holder of the licence within the meaning of s. 23, sub-s. 2, clause (b), of the Licensing (Consolidation) Act, 1910, and a great deal further than anything that is authorized by the specified grounds in the second part of the Second Schedule to the Act. Purporting to act under the jurisdiction given to them to inquire into the question as to whether the applicant was a fit and proper person to hold the licence, they were considering the conditions of his trade, the question whether he could carry it on successfully, and they also took into consideration—in the words of their affidavit—the fact "that the applicant could not properly carry on the business of the licensed premises and that his interest was such as to render him indifferent whether he conducted the premises properly or not." By those words the justices do not mean to say that they considered that the applicant personally was not a fit and proper person, but they intend to indicate that they thought that he could

not carry the business on properly having regard to the business relations between him and the brewers. That seems to me to be going too far. While I agree that they could inquire as to whether he was a fit and proper person, they allowed considerations beyond their jurisdiction to influence their judgment to a substantial extent in this case.

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I have only one other observation to make. I do not express any opinion that the terms of tenancy may not in some cases be relevant in considering whether a person is a fit and proper person to hold a licence. I can conceive that cases might exist in which the terms of tenancy were such that the licensee would have no proper control—would not really be the effective licence holder—and therefore might be a person who really ought not to have a licence granted to him. That would be a circumstance which the justices would be entitled to take into consideration. But, in my judgment, in the present case they have gone much further. They have not given their decision in this case upon the ground that the applicant is not a fit and proper person, nor upon the ground that he is not duly qualified as required by law, but they have decided that the conditions of his tenancy were such that from a business point of view he would not be a successful licence holder. For these reasons the rule for a mandamus must in my judgment be made absolute.

HAMILTON J. I am of the same opinion. An application was made for the transfer of a justices' licence which was within the plain words of s. 23, sub-s. 2, of the Licensing (Consolidation) Act, 1910, and was subject to clauses (a) and (b) of that sub-section; doubtless it was subject also to clause (c). As it was subject to clause (b), the justices were to exercise their discretion upon the question whether the applicant was a fit and proper person to be the holder of the licence. The contention against that view is that the prima facie application of clause (b) to the present case is excluded upon the true construction of clause (c), which says that "The special provisions of this Act affecting the renewal of an old on licence"—this was an ante-1869 beer on licence—"shall apply to the transfer of an old on licence as they apply to the renewal"; but those are plainly not words of exclusion taking old on

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licences out of the operation of the sub-section; they are words of inclusion, bringing to bear upon old on licences not merely clauses (a) and (b) of sub-s. 2 of s. 23, but also the special provisions of the Act. The natural meaning of clause (c) is that the words "the special provisions of this Act," which the clause contains, refer to s. 16, sub-s. 5, to s. 18, and in some respects to ss. 19 and 20. That construction would amply satisfy the language of clause (c). It is, however, contended in support of the rule that clause (c) has the effect of taking an application for the transfer of an ante-1869 beer on licence out of s. 23, and leaving it to be dealt with only under the second part of the Second Schedule, head A, clauses 1, 2, 3 and 4, and that those four grounds constitute an exclusive code which alone governs the transfer or renewal of an old beer-house licence. It is manifest that those four grounds do not constitute an exclusive code, because the fourth ground, namely, "the ground that the applicant . . . is not duly qualified as by law is required," refers to and incorporates other portions of the statute. It is also said that any different construction would treat this Consolidation Act as also being an amending Act. That is often the effect of a consolidation Act, sometimes by inadvertence and sometimes by design. It does not appear to me to be practicable to deduce from a comparison of the ante-1910 position of ante-1869 beer on licences any inference as to what the Legislature intended the post-1910 position of ante-1869 beer on licences to be which would control or conflict with the plain language contained in s. 23, sub-s. 2, clause (c).

In my view, therefore, it was within the jurisdiction of the licensing justices to exercise their discretion upon the question whether or not the applicant was a fit and proper person in their opinion to be the holder of the licence. That discretion, however, wide as it is, must be exercised upon a consideration of the matters which are permitted to justices in this respect by the Legislature. Now it appears from the affidavit of the justices that there was no evidence adverse to the personal character of the applicant, and I do not understand them even to say that any evidence was elicited adverse to his trade fitness for the business; because, although he had never kept a licensed house before, he

had been a cellarman in the employ of the brewers. That the justices were satisfied that his personal character was good may I think be inferred from the fact that in pursuance of the power given to them by s. 88 of the Licensing (Consolidation) Act, 1910, they had granted him a protection order on August 10, 1911, and to whatever extent they may have thought it necessary to inquire into his character and antecedents, they must at any rate have been then satisfied that he was a man against whose character nothing was adducible which would shew that he was an unfit person to receive the grant of a protection order. I think it is clear from the justices' affidavit that it was the relation between the brewery company and the applicant, established by the terms of the agreement of tenancy, which impressed their minds and formed the basis of their decision to refuse the application for the transfer of the licence. It is true that they found that the applicant was not duly qualified as by law is required; but that is a reference only to the relations between the landlord and the tenant. They also found that the applicant was not a bona fide tenant, but as there is no suggestion either in their own findings or in the evidence which they recite that the agreement was not a real agreement of tenancy, I think that that finding refers only to the amount of independence which, in their view, was left to the tenant under the terms to which he had agreed. I think they mean, not that the document which purported to be an agreement was a sham (it was an operative instrument), but that its terms were in their view so stringent with regard to the tenant that when he came to keep the house under those terms he would have found himself fettered to an extent which they thought incompatible with his properly carrying on the business of the licensed premises, and that his interest was such as to render him indifferent whether he conducted the premises properly or not.

That being what I take to be their meaning, it is clear that in their view, having regard to the price at which by the agreement the tenant was to buy his beer, the price at which he was required and covenanted to sell it, and the rent that he would have to pay for the tenancy, his profit would not be adequate to the necessities of a publican. They say that, although he stated

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that he would have a balance of 3*l.* a week, and that he had read and understood the agreement, he was not aware of many of the provisions it contained and was unable to shew how the amount of 3*l.* per week was arrived at; and I think the conclusion they drew from that was that they were doubtful if he would make 3*l.* a week, but that at any rate he could not tell nor did they know how he was going to do it, and so they did not think that he was receiving as much remuneration as they would expect, upon a fair bargain, a publican to receive. This falls very far short of their finding of fact, that he could not properly carry on the business of licensed premises under the terms of the agreement, and that his interest was such as to render him indifferent whether he conducted the premises properly or not. What the justices have done is to take into consideration the adjustment, as they conceived it to be fair, of the relation between the tenant and the landlord, and they have been actuated by a consideration of the question whether in their view the tenant was getting too little and the brewery company too much out of the prospective profits to be made by the sale of beer.

I do not say that there may not be circumstances in which the terms of an agreement of tenancy may not be very material on the question of the fitness and propriety of the person applying to be the holder of the licence, and that there may not be terms of such a character in an agreement that they would of themselves be materials upon which justices could, by an inference judicially drawn, come to the conclusion that they left the tenant no reasonable likelihood of keeping his house within the requirements of the law. But the Legislature has not given the justices power to revise the terms upon which a tied house, as such, is held, or to review the trading relations between a tenant who makes his bargain for himself and a landlord who makes his bargain for himself also. The justices have in this case been actuated, not by those matters on which the Legislature requires them to exercise their discretion, but by considerations which are beyond the purview of their jurisdiction, and which, therefore, they should not have taken into account. That being so, the licence was refused upon grounds which were not open to the justices to act upon.

BANKES J. I agree. It seems to me that in this case there are two questions raised of very great importance from the point of view of the administration of the licensing laws. The first is as to the proper construction of s. 23 of the Licensing (Consolidation) Act, 1910, and the second relates to the matters which the justices may legitimately take into consideration, when exercising their discretion as to whether they will allow or refuse an application for a transfer, in coming to a conclusion as to whether or not any particular applicant for a licence is or is not a fit and proper person to hold the licence.

With regard to the first point, I have very little to add to what has been said by the other members of the Court. The particular licence with which we are dealing is one known, and commonly spoken of, as an ante-1869 beer-house licence. Sect. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), contained a provision "that no application for a certificate under this Act in respect of a licence . . . shall be refused except upon one or more of the following grounds, viz. . . ." and then followed what are commonly known as the four grounds. That language is distinct, and it enacted that no application for any ante-1869 off beer-house licence (extended to any ante-1869 on beer-house licence by s. 19 of the same statute) should be refused except upon one or more of those four grounds. One of the four grounds was "that the applicant . . . is not duly qualified as by law is required."

At the time that Act was passed, and from that time onwards until the passing of the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), one of the qualifications which by law was required in an applicant in such a case was that he was the real resident holder and occupier of the premises (the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1), and so the law continued until the year 1910. In that year the Licensing (Consolidation) Act was passed, and it had to do two things, namely, to consolidate the existing statutes and also to modify the language used in those statutes, so as to meet the change in the law which had previously to the passing of the Act been introduced by recent legislation with reference to compensation on non-renewal of licences. Sect. 18

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of the Act deals with the restriction on the power of the licensing justices to refuse the renewal of old justices' on licences and is expressed in these terms: "The power to refuse the renewal of any such justices' on licence as is described in the first part of the Second Schedule to this Act"—which includes the ante-1869 beer-house licences—"on any ground other than any of the grounds specified in the second part of that schedule"—that is, as regards an ante-1869 on beer-house licence on any ground other than any of the four grounds specified in head A of the second part of the schedule—"shall be vested in the compensation authority and not in the licensing justices." Therefore, although not using the same form and language as the Wine and Beerhouse Act, 1869 (because it was necessary to adapt the language to the new state of circumstances introduced by the Licensing Act, 1904 (4 Edw. 7, c. 23), connected with the granting of compensation), s. 18 of the Licensing (Consolidation) Act, 1910, in substance enacts that the power of the licensing justices with regard to refusing the renewal of ante-1869 on beer-house licences is confined to the four specified grounds.

The provisions with reference to the transfer of licences are contained in s. 23 of the Licensing (Consolidation) Act, 1910, which commences by enacting that "For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence." In sub-s. 2 are set out the grounds upon which the licensing justices may exercise their discretion with regard to allowing or refusing an application for a transfer. The sub-section provides that "an application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows." Then follow certain conditions, the first of which is contained in clause (a) of the sub-section, and if the language of the Fourth Schedule, which it incorporates, is read into it, the result is that it enumerates the cases in which, and the persons to whom, the transfer may be granted. If the occupation of premises is given up by the holder of a licence or his representative, the persons to whom the transfer may be granted include the new tenant or occupier of the premises. In the case of an application by a new tenant or occupier of the premises, it is in my judgment competent for the justices to

ascertain whether the applicant is or is not a new tenant or the occupier of the premises.

In support of the rule it was contended that clause (c) of sub-s. 2 of s. 23 ought to be read as meaning that the power to refuse the transfer of an ante-1869 on beerhouse licence is confined to a refusal upon one or more of the four grounds specified in head A of the second part of the Second Schedule. I am not sure that that can properly be said to be the meaning of the clause, but assuming that it is, the last of the four grounds there mentioned is "that the applicant . . . is not duly qualified as by law is required." Those words make it necessary to examine the provisions of the Licensing (Consolidation) Act, 1910, in order to ascertain the qualifications under the Act of an applicant for the transfer of a licence of this kind. It is impossible, in my judgment, to hold that because the Finance Act, 1910, abolished the qualifications which had hitherto existed under the Wine and Beerhouse Act, 1840, therefore the Licensing (Consolidation) Act, 1910, cannot be looked at in order to ascertain whether that Act has substituted some qualification for that which had been contained in the Wine and Beerhouse Act, 1840. In my judgment, upon the true construction of s. 23 of the Licensing (Consolidation) Act, 1910, the provisions of the Fourth Schedule (which is incorporated by clause (a)) include a substituted qualification for that which was originally contained in s. 1 of the Wine and Beerhouse Act, 1840, and s. 23 has in addition enacted that a transferee must be a fit and proper person in the opinion of the justices to be the holder of a licence, otherwise he cannot be said to be "a person duly qualified as by law is required."

The second point which arises, namely, the question as to what matters the justices are entitled to take into consideration in arriving at a conclusion as to whether any particular person is a fit and proper person to be the holder of a licence, seems to me to be a very important one. It would not be right that this Court should interfere in any case where upon proper materials the justices have exercised an honest discretion. On the other hand, the Court should not hesitate to intervene in cases where it is satisfied that, under cover of an inquiry into the question whether a particular person is or is not a fit and proper person to hold a

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licence, the justices have inquired into and been influenced by considerations which are wholly foreign to any such inquiry. I do not agree with the contention that the inquiry into the question whether a particular person is or is not a fit and proper person to hold a licence ought to be confined to an inquiry as to that person's character. It would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances. As illustrations merely of what in my judgment are matters admissible for consideration, I would mention the health of the applicant, his temper and disposition. I cannot think that a paralysed person, for instance, or a person of so combative a temperament that breaches of the peace would be a certain consequence of permitting him to hold a licence, would be a fit and proper person to hold a licence. At any rate, it is, I think, quite clear that the discretion that is given to the justices in the selection of fit and proper persons to hold licences does not include the power to dictate the terms upon which the applicant is to conduct his business, if those terms do not in any proper sense affect his fitness to hold the licence, and to treat the applicant as an unfit person to enjoy the licence because he refuses or is unable to accept those terms. In my view that is what the justices have done in the present case. They have assumed a jurisdiction which I do not think they possess: first of dictating the terms which the brewer shall offer to his tenant, and secondly of endeavouring to control the legitimate exercise of the brewer's discretion as to the way he shall conduct his business in competition with other brewers in the district.

I arrive at this conclusion from the justices' own statement of what occurred. In the letter which their clerk wrote after having seen the proposed agreement between the landlord and tenant, he stated that "judging from the schedule and one or two clauses in the agreement, the justices think you are proposing to introduce a new system in Hyde." It appears to me from the agreement, coupled with the affidavit of the justices, that the "new system" referred to in that letter, and which formed the ground of the justices' objection, was that the brewer

and the applicant, his tenant, were intending to introduce into this district a system under which the more expensive beer—the 37s. beer—was to be sold at 2d. a pint, in competition with other persons in the district who were selling a much cheaper beer—costing 27s. or thereabouts—at the same price. The justices also say in their affidavit that they objected to certain clauses in the draft agreement, one of which was clause 2, paragraph 9, which provided that the tenant should not at any time during or upon or after the expiration of his tenancy “demand or require directly or indirectly any moneys in consideration of goodwill for the trade of the said house and premises it being expressly agreed that the tenant shall have no claim upon the landlords in respect of any increase of business which may take place during the tenancy.” They also mention a provision in paragraph 1 (e) of clause 4, that “if any notice or complaint shall be given or made by any justice of the peace or by the superintendent or acting superintendent for the time being of the local police force as to the conduct or management of the said premises” it should be a ground for the determination by the landlords of the tenancy without notice.

In expressing the above views I desire to guard myself against being understood to say that an inquiry into the terms on which an applicant intends to carry on his business, either as between himself and the landlord or as between himself and the public, can never be material. It may be that the circumstances are such that the only legitimate inference from a consideration of those terms is that the applicant cannot carry on his trade without infringing the law, and if the only legitimate conclusion from the terms arranged between the landlord and the tenant is that in any ordinary business it would be impossible for the applicant to carry on his trade either without permitting drunkenness, or permitting gaming, or watering his beer, or some such infringement of the law, then I think the justices might legitimately come to the conclusion that such a man in such a position was not a fit and proper person to hold a licence.

In this case there was no evidence of that kind; on the contrary, I think it is plain that the justices have taken into consideration matters which they were not entitled to take into

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consideration and have assumed a jurisdiction which they did not possess, and for the purpose of exercising that jurisdiction they have sought to impose terms upon persons which they had no right to impose.

I agree that this rule ought to be made absolute.

Rule absolute.

Solicitors for applicant: *Indermaur & Brown, for W. F. Chambers, Denton, Lancashire.*

NOTE.—Licensing (Consolidation) Act, 1910, s. 18, sub-s. 1: “The power to refuse the renewal of any such justices’ on-licence as is described in the First Part of the Second Schedule to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the Second Part of that schedule shall be vested in the compensation authority and not in the licensing justices, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act.”

Sect. 23, sub-s. 1: “For the purposes of this Act the transfer of a justices’ licence is the grant of a justices’ licence in respect of certain premises to one person in substitution for another person who holds or has held the licence.”

Sub-s. 2: “An application for the transfer of a justices’ licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows:—

- “(a) A transfer can only be authorised in the cases mentioned in the first column of the Fourth Schedule to this Act and to the persons set opposite thereto respectively in the second column of that schedule.
- “(b) The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence in addition to being a person to whom a transfer can be authorised under the foregoing provision.
- “(c) The special provisions of this Act affecting the renewal of an old on-licence shall apply to the transfer of an old on-licence as they apply to the renewal.”

Sect. 25, sub-s. 2: “In the case of an application for the transfer of a justices’ licence . . . the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices . . .”

Sect. 34 enacts (inter alia) that justices’ licences are not to be granted to persons who are disqualified for the purposes of the Act, and s. 35 enumerates the persons who are so disqualified.

"SECOND SCHEDULE

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"FIRST PART.

"DESCRIPTION OF OLD ON-LICENCES.

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"Justices' on-licences which were in force on the fifteenth day of August nineteen hundred and four, including—

"(a) licences granted by way of renewal of a licence so in force; and

"(b) licences which, though not in force at that date, had been before that date provisionally granted and confirmed under section twenty-two of the Licensing Act, 1874, in cases where the provisional grant and order for confirmation was subsequently declared final,

whether the licence continues to be held by the same person or has been or may be transferred to any other person or persons.

"For the purpose of the foregoing description of old on-licences, the expression 'on-licence' does not include licences for the sale of wine alone or sweets alone.

"Old on-licences for the sale of beer or cider, with or without wine, which were granted in respect of premises for which a corresponding excise licence was in force on the first day of May eighteen hundred and sixty-nine (including licences granted by way of renewal of such a licence, whether the licence continues to be held by the same person, or has been or may be transferred to any other person) are in this schedule referred to as old beerhouse licences.

"SECOND PART.

"SPECIFIED GROUNDS.

"(A) In the case of old on-licences which are old beerhouse licences—

"(1.) the ground that the applicant has failed to produce satisfactory evidence of good character:

"(2.) the ground that the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the applicant is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character:

"(3.) the ground that the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles:

"(4.) the ground that the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

"(B) In the case of any old on-licences other than old beerhouse licences—

"(2.) grounds connected with the character or fitness of the proposed holder of the licence:

"

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"FOURTH SCHEDULE.

"CASES IN WHICH AND PERSONS TO WHOM A TRANSFER MAY BE GRANTED.

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| "Death of the holder of the licence - | The representatives of the holder of the licence or the new tenant or occupier of the premises. |
| "Incapacity of the holder of the licence to carry on business under the licence owing to sickness, or other infirmity. | The assigns of the holder of the licence or the new tenant or occupier of the premises. |
| "Bankruptcy of the holder of the licence. | The trustee of the bankrupt or the new tenant or occupier of the premises. |
| "Occupation of premises given up by the holder of the licence or his representatives. | The new tenant or occupier of the premises, or the person to whom the representatives or assigns have, by sale or otherwise, bona fide conveyed or made over the interest in the premises. |

."

Finance Act, 1910, s. 2: "A person shall not be disqualified for receiving a beer retailer's licence by reason only that the premises in respect of which he applies for a licence are not a dwelling-house, or that he is not the real resident holder and occupier of the premises, and the words from 'to any person' to 'licensed nor shall any such licence be granted' in section one of the Beerhouse Act, 1840, are hereby repealed."

J. E. A.

[IN THE COURT OF APPEAL.]

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PARRISH v. MAYOR, &c., OF HACKNEY.

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Nov. 9, 10 ;
Dec. 4.

Rates—Metropolis—Quinquennial Valuation—Provisional List—“Subsequently made”—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47, sub-ss. 8, 10.

A valuation list is not “made” within the meaning of s. 47, sub-s. 8, of the Valuation (Metropolis) Act, 1869, which provides that a provisional list shall continue in force “until the first list (supplemental or other) which is subsequently made comes into force,” until it is finally approved by the assessment committee.

The plaintiff was the occupier of licensed premises within the defendants’ borough, which were assessed in the quinquennial valuation list of 1905 at gross value 400*l.*, rateable value 334*l.* After the Finance (1909-10) Act, 1910, was passed the value of the plaintiff’s premises was diminished, and they were inserted in a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869, at gross value 319*l.*, rateable value 266*l.* A copy of this list was served on the plaintiff on June 30, 1910; the list was finally approved by the assessment committee on November 23, 1910, and it thereupon (according to the admission of counsel), by virtue of s. 47, sub-s. 8, came into operation as from June 30. A new quinquennial valuation list was made in 1910; it was sealed by the defendants on May 30, and finally approved by the assessment committee on October 31; in it the plaintiff’s premises were assessed at gross value 180*l.*, rateable value 150*l.*; this list came into force on April 6, 1911. On April 12, 1911, the defendants made a general rate in which the plaintiff was assessed at a rateable value of 266*l.* :—

Held, that the quinquennial list was “made,” not when it was compiled or deposited by the overseers, but when it was finally approved by the assessment committee; that it was therefore “made” subsequently to the provisional list; that under s. 47, sub-s. 8, the provisional list ceased to be operative on April 6, 1911; and that the plaintiff was entitled to be rated upon a rateable value of 150*l.* only and to be repaid by the defendants the amount overpaid by him.

Decision of Warrington J. [1911] 2 K. B. 822, affirmed.

APPEAL from a decision of Warrington J. sitting as an additional judge of the King’s Bench Division, reported [1911] 2 K. B. 822.

The plaintiff, who was the occupier of licensed premises within the borough of Hackney, which premises had been inserted in the quinquennial valuation list made in the year 1905 for the parish in which they were situate, claimed a declaration that a

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rate of April 12, 1911, was illegal and unauthorized so far as the gross and rateable values were different from those fixed by the quinquennial valuation list made in 1910. The plaintiff also asked for an injunction and for the return of money overpaid in respect of rates.

It appeared that in the quinquennial valuation list for the parish made in 1905 the plaintiff's premises were assessed at gross value 400*l.*, rateable value 334*l.* After the Finance (1909-10) Act, 1910, was passed the value of the premises was depreciated, and in accordance with the decision in *Rex v. Shoreditch Assessment Committee* (1) they were inserted in a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869. In this list as finally approved by the assessment committee on November 23, 1910, the plaintiff's premises were assessed at gross value 319*l.*, rateable value 266*l.* A copy of this list as originally compiled by the overseers, so far as it concerned the plaintiff's premises, together with the notice required by s. 47, sub-s. 3, of the Act of 1869, was served on the plaintiff on June 30, 1910, and by virtue of s. 47, sub-s. 8, the provisional list thereupon came into operation.

In 1910 a new quinquennial list was made, to which the common seal of the defendants was affixed on May 30, 1910, and in it the plaintiff's premises were assessed at gross value 400*l.*, rateable value 334*l.* The plaintiff objected, and in the list as finally determined by the assessment committee on October 31, 1910, the assessment of the premises appeared as gross value 180*l.*, rateable value 150*l.* Under s. 43 of the Act of 1869 this quinquennial list came into force on April 6, 1911, and the plaintiff contended that under s. 47, sub-s. 8 (2), the provisional list thereupon ceased

(1) [1910] 2 K. B. 859.

(2) Valuation of Property (Metropolis) Act, 1869, s. 47: "(8.) A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes

into force."

"(9.) Upon a provisional list coming into operation the overseers shall make such entries in the rate book for the then current poor rate as will bring the same into conformity with such list, and shall also enter therein the date at which such list is to come into operation, and shall charge the occupier of such hereditament with a proper propor-

to be operative, and that the quinquennial list was from that day the valuation list in force in the parish. On April 12, 1911, the defendants made a general rate, payable in two instalments, for the parish. They rated the plaintiff's premises at 266*l.*, and claimed from him 53*l.* 4*s.* The plaintiff claimed that the rateable value should have been that appearing in the quinquennial list, namely 150*l.*, and that he ought to have been called upon to pay only 30*l.* In respect of general rates during the period from June 30, 1910, to March 31, 1911, he paid to the defendants 79*l.* 16*s.*, calculated upon the rateable value of 266*l.* appearing in the provisional list, and he claimed under s. 47, sub-s. 10, of the Act of 1369 repayment of 34*l.* 16*s.*, being the excess beyond what he would have paid on an assessment of 150*l.* The defendants contended that the provisional list was still in force and had not ceased to operate on April 6, 1911, inasmuch as the quinquennial valuation list, not having been made subsequently to it, did not displace it.

Warrington J. held that the quinquennial list was "made" when it was finally approved by the assessment committee and was therefore made subsequently to the provisional list; that the plaintiff was entitled to be rated on a rateable value of 150*l.* only and to have the amount overpaid by him repaid.

The defendants appealed.

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tion of such current poor rate, regard being had to the time which has elapsed between the making of such rate and the said date and to the rateable value stated in such provisional list, and such occupier shall be considered as actually rated for such sum from the said date, and be liable to pay the same, and the same may be enforced accordingly."

"(10.) A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in

respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed."

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C. A. Russell, K.C., and J. M. Stone, for the defendants.

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The question is whether, within the meaning of the Valuation (Metropolis) Act, 1869, s. 47, sub-s. 8, the new quinquennial valuation list was made subsequently to the coming into operation of the provisional list. It is contended for the defendants that it was not so made. Sect. 47, sub-s. 8, provides that a provisional list "shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force." The provisional list in the present case came into operation on June 30, 1910, and it is contended that the new quinquennial list was "made" on May 30, 1910, at the time when it was sealed by the defendants. The valuation list is "made," within the meaning of s. 47, sub-s. 8, when it is made and signed by the overseers of the parish in pursuance of s. 6 of the Act, which section provides that the overseers of every parish to which the Act extends "shall make and sign a valuation list of their parish in duplicate, in accordance with this Act." The list then comes into existence as the quinquennial list of the rateable hereditaments in the parish with their values, and throughout the rest of the Act it is treated as being thenceforward a known, existing thing. The list referred to in s. 47, sub-s. 8, is the list so made by the overseers. Objections may be made to it before the assessment committee, and it is subject to revision by them under s. 14. The great majority of the entries in it are not interfered with, but some may be revised by the assessment committee. When so revised they finally approve the list, but such revision and approval are not part of the making of the list, which has already been made by the overseers. The revision of the list has a retrospective operation when the list is finally approved, and it is as if the figures as revised had been originally inserted in the list made by the overseers. It has always been the overseers who "made" the valuation list. Originally the overseers made the valuation of the hereditaments in their parish for the purposes of the rate, subject only to an appeal against the rate to the sessions by any person aggrieved. In

1862 by the Union Assessment Act, 1862 (25 & 26 Vict. c. 103), which is incorporated by s. 1 of the Valuation (Metropolis) Act, 1869, the assessment committee was introduced, and by s. 14 of that Act it was provided that the overseers of each parish in the union should "make a list of all the rateable hereditaments in such parish with the annual value thereof respectively." That list was made subject to revision by the assessment committee, but the overseers were the persons to "make" it. The function of the assessment committee under that Act, as under the Act of 1869, is to supervise and correct the list which is "made" by the overseers, not to "make" the list. It is true that the Act of 1869 does not in terms say that the assessment committee, in revising the list, may not take into consideration matters which have arisen since the overseers made it out, but, having regard to the whole scheme of the Act of 1869, it seems clear that the valuation, whether for the purposes of a quinquennial or a supplemental list, must be as of the time when the list is made by the overseers. Therefore the objections which under that Act may be raised to the list as made by the overseers must be confined to objections to the correctness of the valuation at the time when the overseers made it, and any revision of the valuation made by the assessment committee must be considered as relating back to the time of the making of the list. It cannot have been intended that the assessment committee should revise a valuation list which at the time when it was made by the overseers was a perfectly correct valuation. It is submitted that the list must be looked at as an entirety made at one point of time, namely, the time when it is signed by the overseers, whereas the construction adopted by the learned judge in the Court below really involves reading the word "made" distributively and that the list is made at different times with regard to the different items therein. The quinquennial list when approved by the assessment committee comes into force at the beginning of the year (commencing on April 6) succeeding that in which it is made: see s. 43 of the Act of 1869. To meet the case of alterations in value during the quinquennial period s. 46 of the Valuation (Metropolis) Act, 1869, provides that there is to be made in each of the

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first four years of the quinquennial period by the overseers a supplemental list shewing all the alterations which have taken place during the preceding twelve months in "any of the matters stated in the valuation list"; and this supplemental list is subject to revision by the assessment committee in the same manner as the quinquennial list. That supplemental list is to come into force at the beginning of the year succeeding that in which it is made. Sect. 47 of the Act provides for the making of a provisional list, if in the course of any year the value of a particular hereditament is increased by the addition thereto or erection thereon of any building, "or is from any cause increased or reduced in value." It was held in *Rex v. Shoreditch Assessment Committee* (1), that a diminution in the value of licensed premises by reason of the provisions of the Finance (1909-10) Act, 1910, came within the purview of s. 47. A provisional list is made on the basis that the existing valuation is correct, except so far as it requires alteration owing to circumstances which have arisen peculiarly affecting the value of the particular hereditaments in that list, whereas the valuation for the purposes of the quinquennial list is a valuation de novo: see *Reg. v. Poplar Union Assessment Committee*. (2) The meaning of s. 47, sub-s. 8, would appear to be that a provisional list shall only be displaced by a list made in contemplation of the same circumstances. It is impossible to suppose that the quinquennial valuation list which was sealed on May 30, 1910, dealt with a reduction in value of the particular hereditament in question by reason of the provisions of the Finance Act, 1910. The next supplemental list will deal with the value of the plaintiff's premises as affected by that Act. Even assuming that the quinquennial list was not "made" until October 31, it was not made subsequently to the provisional list, which was not finally approved by the assessment committee until November 23.

With regard to the second point, namely, whether the plaintiff is entitled under s. 47, sub-s. 10, of the Act of 1869 to repayment of the money which he has paid for rates in excess of the amount which would have been payable on the value as stated in the quinquennial list, it is contended that, on the terms of that

(1) [1910] 2 K. B. 859.

(2) (1884) 13 Q. B. D. 364.

sub-section, he is not so entitled. Sect. 47, sub-s. 10, provides that a provisional list, while it is in force, shall be deemed to form part of the valuation list for the time being in force and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, but "if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed." The making of a quinquennial list is not a revision of the valuation list within the meaning of s. 47, sub-s. 10. The quinquennial list is a new list, and not a revision of an existing list. If the section were construed in the way contended for by the plaintiff, it would give to a ratepayer whose hereditament had been put into a provisional list an unfair advantage over other ratepayers.

Ryde, K.C., and *Konstam*, for the plaintiff. The question does not depend upon the Finance Act, 1910; it turns upon the construction of the Valuation (Metropolis) Act, 1869. The contention of the defendants that, although the plaintiff's premises are assessed in the new quinquennial valuation list at 150*l.*, the plaintiff must nevertheless pay rates for eighteen months upon the assessment of 266*l.* in the old provisional list cannot be justified. A provisional list only applies to matters affecting a particular property comprised in it; a drop in the value of property generally will, or may, be allowed for in the quinquennial list. No doubt, in the main, the question depends upon the construction of s. 47 of the Valuation (Metropolis) Act, 1869, but that section cannot be properly understood without having regard to the whole Act. There is an important distinction, going to the root of the matter, between a provisional list on the one hand and a supplemental list or a quinquennial list on the other hand. Under s. 18 of the Union Assessment Committee Act, 1862 (which Act is incorporated with the Valuation (Metropolis) Act, 1869), a right of objection is given to a quinquennial or supplemental list, but not to a provisional list; in the case of the former lists the widest grounds of appeal are

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given to every ratepayer. And by s. 20 of the Act of 1862 the widest powers of revision and amendment are given to the committee who have to consider the valuation list transmitted to them by the overseers, so wide, indeed, that it is conceivable that every hereditament inserted by the overseers might be struck out or altered. These provisions are specially applied to the metropolis by s. 7 of the Act of 1869. Minute provisions for appeals against valuation lists are made by ss. 33—41 of the Act of 1869; but no appeal is given in the case of a provisional list, a fact which shews that the Legislature intended such a list to be temporary only. Then by s. 46 the valuation list is to be revised every five years, which is to be done (sub-s. 2) by the overseers making a new valuation list in the fifth year of each quinquennial period. No doubt overseers have a wide discretion as to the time at which they shall deposit the valuation list; it may be as early as April 6, and not later than May 31; but Parliament cannot have intended that the rights of the ratepayers should depend upon the exercise of the discretion of the overseers as to whether they should publish a provisional list or a quinquennial list first. It is impossible to regard the quinquennial list as being made as of the date of its deposit, because of the discretion of the overseers as to the date when they shall deposit it; the date of deposit is really an accidental date, and if there is any governing date it would seem to be April 6. The date at which the value of premises in the quinquennial list is found is the date at which the committee in fact inquire into it and decide upon the figure. The defendants cannot successfully contend that, if the effect of the Finance Act is taken into account in settling the quinquennial list, it would also be taken into account in the next supplemental list, so that the plaintiff would get the allowance twice over; the supplemental list need not record an alteration already appearing in the quinquennial list. Sect. 47 of the Act of 1869 provides for the making of a provisional list "if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value." No doubt the wording of the section might be more scientifically precise, but it is impossible to maintain that there is any distinction in meaning between the

expressions "have operation" and "come into operation" in sub-ss. 8 and 9 respectively. The word "made" in s. 47, sub-s. 8, does not mean the original making out of the list by the overseers; it refers to the final approval of the list by the committee. The result is that, as the quinquennial list was finally approved on October 31, 1910, it was the first list "made" subsequently to the provisional list, and the latter list ceased to be in force after April 6, 1911, when the quinquennial list came into operation. Under s. 47, sub-s. 10, the plaintiff is entitled to repayment of the amount of rates overpaid by him in consequence of the rates having been calculated upon the rateable value of 266*l.* appearing in the provisional list instead of upon the assessment of 150*l.* in the quinquennial list. [They cited *Fulham Union Assessment Committee v. Wells* (1); *Reg. v. Poplar Union Assessment Committee* (2); *Ellis v. Camberwell Assessment Committee* (3); *Reg. v. New River Co.* (4)]

C. A. Russell, K.C., in reply. Although the word "made" may not in the Act of 1869 always mean something done by the overseers, it is clear from a consideration of ss. 6 and 13 that, wherever reference is made to the making of a valuation list, it means the making of the list by the overseers or by persons appointed to make it on their default. All subsequent proceedings are concerned with the revision and final approval of the list, not with its making.

Cur. adv. vult.

Dec. 4. BUCKLEY L.J. read the following judgment:—On April 29, 1910, was passed the Finance (1909-1910) Act, 1910, which contained new legislation as to duties on licensed premises. On May 30, 1910, the overseers of the parish in which the premises the subject of this appeal were situate made and signed under s. 6 of the Valuation (Metropolis) Act, 1869, a valuation list with a view to the quinquennial valuation which, when made, would take effect as from April 6, 1911. On June 17, 1910, the King's Bench Division granted a mandamus as reported in *Rex v. Shoreditch Assessment Committee*. (5) As a

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(1) (1888) 20 Q. B. D. 749.

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(2) 13 Q. B. D. 364.

(4) (1879) 4 Q. B. D. 309.

(3) [1900] 1 Q. B. 68; [1900] A. C.

(5) [1910] 2 K. B. 859.

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result, I suppose, of the judgment in that case, (which was subsequently affirmed on appeal in July), the overseers of this parish on June 29 made and signed a provisional list. On June 30 this provisional list was, in compliance with s. 47, sub-s. 3, of the Act of 1869, served on the occupier. Under s. 47, sub-s. 8, of the same Act the provisional list had operation "from the date of service of the list and notice on the occupier." The list last previously mentioned in s. 47, sub-s. 8, is the "provisional list signed as aforesaid," that is, signed as mentioned in s. 47, sub-s. 7. This is not the original but the altered list. Upon this a question might be raised whether the provisional list as from the date of whose service the provisional list is to have operation is the altered list mentioned in s. 47, sub-s. 7, or the original list mentioned in s. 47, sub-s. 3. I thought it right to call the express attention of the appellants' counsel to this point, being one which had not been taken either in the Court below or before us, and to ask whether they wished to contend that s. 47, sub-s. 8, refers to a service of the altered list. They have stated that they elect not to take the point. Under these circumstances this judgment proceeds upon the footing that all parties admit that the date of service mentioned in s. 47, sub-s. 8, is the date of service of the original provisional list under s. 47, sub-s. 3. That date is in this case June 30, 1910. The whole of the rest of this judgment is to be read as given upon this footing.

This provisional list was subsequently approved by the assessment committee on November 23, 1910. In the interval, namely, on October 31, the quinquennial list was completed. The premises here in question were in the provisional list inserted at a rateable value of 266*l*. In the quinquennial valuation list they were inserted at a rateable value of 150*l*. In this state of facts the defendants on April 12, 1911, imposed upon these premises a rate upon a rateable value of 266*l*., and not of 150*l*., as fixed by the quinquennial valuation, which had come into operation on the previous April 6. The question on this appeal is whether this is right. In my opinion it is wrong.

The quinquennial valuation list is a list to be initiated and completed as directed by ss. 17—21 of the Union Assessment

Committee Act, 1862 (see s. 7 of the Act of 1869). As matter of date it is to be initiated by the overseers before June 1 (s. 42, sub-s. 1), and is to be finally approved by the assessment committee before November 1 (s. 42, sub-s. 8), and as so completed is to come into operation on the next ensuing April 6. It is a list which is initiated by the overseers making it and signing it at a date which they can select at will, provided it be before June 1. It is subject to review by all the elaborate machinery which the Acts provide for the protection of the ratepayers. When completed and approved it enures for five years, subject to any alterations which may from time to time be made by supplemental or provisional lists (s. 43).

A supplemental list is similar to a quinquennial list in all the particulars above described as regards the date of initiation, completion, and coming into operation, and to all regulations and proceedings in the matter of appeals, and so on, which are applicable to a quinquennial list. The valuation list in force on April 5 in any year during the quinquennium is on that date altered by the supplemental list which comes into force at that time (s. 46, sub-s. 5). In preparing a supplemental list the rateable value in the current quinquennial list, as altered by any previous supplemental list, is to be assumed to be right, subject only to such increase or reduction as is to be attributed to any change of circumstances during the preceding twelve months taken from April to April. The only relevant difference between a quinquennial and a supplemental list for the present purpose lies in the fact that in the case of the supplemental list that assumption is made, while in the case of the quinquennial list no assumption is made, but a new valuation altogether is arrived at.

A provisional list differs from the above in material particulars. Any ratepayer can require under s. 47, sub-s. 1, a provisional list. It is to be sent to the assessment committee by the overseers, and after the steps detailed in s. 47 is to be dated and signed by the clerk to the assessment committee, and the assessment committee are to send a copy to the overseers. Sect. 47, sub-s. 8, then provides that the provisional list so signed shall have operation from the date of service on the occupier, and shall

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“continue in force until the first list (supplemental or other) which is subsequently made comes into force.” The question is as to the true meaning of the words “subsequently made.” As regards the provisional list, it is to be noted that the material date is not that of its completion, but the date of its service, and the latter, according to the admission of counsel, is in this case June 30. A quinquennial list and a supplemental list, when completed and signed, come into force at a postponed date, namely, the next ensuing April 6. A provisional list, when completed and signed, comes into force, as is admitted by counsel, as from an antecedent date, namely, the date of service of the original list. It is not completed until it is dated and signed by the clerk of the assessment committee, but when that is done it has operation from an earlier date, namely, the date of service of the original list. Under these circumstances the words “subsequently made,” having regard to the context, necessarily mean made at some date subsequent to the date of service of the original provisional list. The other and most material observation upon the provisional list is that the careful provisions of the Act for revision and appeal which are enacted in the case of the quinquennial and the supplemental lists do not extend to the provisional list.

In this state of facts the provisional list is, I think, plainly something which is to be, as the name expresses, provisional or temporary in its character, and is to have effect only until the next list not of that character comes into force, and I should therefore expect to find the enactment providing that, so soon as the quinquennial or supplemental list shall have been made upon which those new facts affecting the rateable value upon which the provisional list was settled could have been and ought to have been considered, the provisional list shall cease to have validity. In my opinion this is the effect of the Act. The contention to the contrary is rested upon an argument that the word “made” with reference to a quinquennial list means made and signed by the overseers under s. 6. The act of the overseers in making and signing the list is an act of relatively small importance; it is an act which can be done at any date not later than May 31, and it is an act which can be reviewed and

altered under all the provisions of the Act. The list made by the overseers never necessarily comes into force at all. That which comes into force is the list initiated by the overseers by making and signing it, and which after review is finally approved and sent to the overseers under s. 42, sub-s. 8. In the present case the quinquennial list was, I think, made within the meaning of the word "made" in s. 47, sub-s. 8, not on May 30, when the overseers signed it, but on October 31, when it had assumed its final form and the assessment committee finally approved it. There was never made a quinquennial list which entered these premises at a rateable value of 266*l.* (the figure in the overseers' list). The list "made" was that which entered the premises at 150*l.* (the figure at which they were ultimately assessed). The last-mentioned list was made on October 31, not on May 30.

It is, however, said that, even if this be so, the appellants are right, because the provisional list was not approved until November 23, and that was a date subsequent to October 31. With this is included another contention, namely, that if the quinquennial list was made on October 31 the provisional list was made on November 23, and therefore the quinquennial list was not subsequently made. This is a fallacy. The point, as I have pointed out, is whether the quinquennial list was made subsequently to the date when the provisional list was served. It is not the date when the provisional list was completed and approved, but the date when the provisional list was served, and that was June 30.

The respondent has pointed out that, upon the footing on which this judgment proceeds, s. 47, sub-ss. 8 and 9, contain, in another respect, indications of inaccuracy and even confusion of language, such that strict accuracy of language cannot be looked for in them. Under sub-s. 8 the provisional list has operation from service, and under sub-s. 9 upon its coming into operation the overseers are to make entries in the rate book for the then current poor rate so as to bring the same into conformity with the list. Take the dates in this case—June 29 signature and June 30 service of the provisional list, November 23 approval of the provisional list. The provisional list therefore on November 23 came into operation as from the previous June 30.

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On November 23 the overseers for the first time knew what the altered figure was. The then current poor rate will be that made, say, in October. There will be no statutory authority to alter the rate book for the rate made, say, in the previous April, and yet the provisional list is to have operation as from June 30. If, to get over this difficulty, you say that "coming into operation" means June 30, then the overseers are ordered to enter in the rate book in June a figure which they will not know until the next November.

In my judgment the first list made subsequently to June 30, the date when this provisional list had operation, was the quinquennial list which was made on October 31. That list came into force on April 6, 1911, and on April 12, 1911, the defendants could rate only upon the 150*l.* and not upon the 266*l.* It follows, in my judgment, that this appeal must be dismissed with costs.

VAUGHAN WILLIAMS L.J. I concur. This Act is capable of two constructions, and in my judgment the construction adopted by Buckley L.J. is the construction which makes this Act of Parliament reasonable in practice.

KENNEDY L.J. I agree in the judgment which has just been read, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Godden, Son & Holme.*

Solicitor for defendants: *W. A. Williams.*

W. J. B.

[IN THE COURT OF APPEAL.]

HALL v. WHITEMAN.

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Dec. 12, 13,
16.

Bill of Sale—Validity—Form in Schedule, Deviation from—Contemporaneous Document—Condition of making Advance—Covenant—Defeasance of Security—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 3—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 7, 9.

At the time of the giving of a bill of sale as security for an advance and before the completion of the transaction, the grantee obtained from the borrower a letter addressed to the grantee and signed by the borrower to the following effect—"I have this day obtained from you the sum of 34*l.* upon the faith of my representation that the furniture" comprised in the bill of sale "is my own property free from any charge . . . and I hereby undertake and agree not to mortgage the same or any part thereof in any way whatsoever nor borrow from any other loan office until the whole of the above sum has been repaid. Further I am quite aware that it is solely upon the faith of these representations that I have obtained the advance from you." This covenant was not inserted in the bill of sale, which otherwise was in the statutory form.

The jury found that the signature of the letter by the borrower was a condition of obtaining the advance:—

Held, that as the covenant ought to have been inserted in the bill of sale, and, if so inserted, would have operated as a defeasance of the security by virtue of the defeasance clause therein contained, the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and was therefore absolutely void under s. 9 of that Act.

Decision of Pickford J. affirmed.

Smith v. Whiteman [1909] 2 K. B. 437, applied.

APPLICATION of the defendant for judgment or a new trial in an action tried before Pickford J. and a common jury.

The action was brought against the defendant, a money-lender, for (inter alia) an injunction to restrain the defendant from trespassing upon the plaintiff's goods and residence and a declaration that the bill of sale dated February 18, 1910, in the statement of claim mentioned was void on the ground that the real bargain between the parties was not contained in the bill of sale and was contrary to the statutory form, and for other relief.

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There had been four separate transactions and four separate bills of sale between the plaintiff and defendant. The third bill of sale was dated September 11, 1909, and was the one referred to in the bill of sale next stated.

The last bill of sale was given by the plaintiff to the defendant on February 18, 1910, and was expressed to be to secure a sum of 36*l.* It was in the statutory form and stated that in consideration of the sum of 36*l.* made up as follows:—the sum of 21*l.* 4*s.* 10*d.* in full discharge of an existing bill of sale at the request of the mortgagor and the sum of 14*l.* 15*s.* 2*d.* then paid by the mortgagee—the mortgagor assigned to the mortgagee the chattels and things specified in the schedule thereto annexed and then being in or about 50, Raymond Road, Upton Park, Essex, by way of security for the repayment of 36*l.* and interest at the rate of 60*l.* per centum per annum, repayment to be made by instalments of 3*l.* and interest over a period of twelve months. There was the usual proviso that the chattels comprised in the bill of sale should not be liable to seizure for causes other than those mentioned in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, clause 1 of the proviso being in terms similar to clause 1 of the section.

The plaintiff in fact only received 13*l.* in cash, the defendant deducting a sum of 1*l.* 15*s.* 2*d.* in respect of expenses.

A letter of even date, addressed by the plaintiff to the defendant and signed by the plaintiff, was in the following terms:—
“I have this day obtained from you the sum of 34*l.* upon the faith of my representation that the furniture in the house at 50, Raymond Road, Upton Park, in the county of Essex, is my own property, entirely free from any charge either by bill of sale, marriage settlement, or hire system agreement, and I hereby undertake and agree not to mortgage the same or any part thereof in any way whatsoever nor borrow from any other loan office until the whole of the above sum has been repaid. Further, I am quite aware that it is solely upon the faith of these representations that I have obtained the advance from you.”

In respect of this bill of sale 3*l.* was paid by the plaintiff on March 21, 1910. On May 13, 1910, the defendant wrote to the plaintiff pressing for further payment and threatening to take

possession if the money were not paid. On May 18 the plaintiff issued the writ in this action.

The defendant counterclaimed for the balance of principal and interest due to him.

At the trial the jury found (*inter alia*) that the document of February 18, 1910, was signed by the plaintiff before he executed the bill of sale, and that the plaintiff was required to sign it as a condition of obtaining the advance.

The learned judge held that the letter of February 18, 1910, was a condition of the bill of sale of that date within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and that if the letter was a condition of the bill of sale, such condition was inconsistent with and could not have been included in the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and that such bill of sale was therefore wholly void, and he accordingly directed that judgment should be entered for the plaintiff for an injunction as asked and for a declaration that the bill of sale of February 18, 1910, was void.

The defendant appealed on the grounds that the learned judge was wrong in law in each of his holdings above mentioned, and also in holding further that the consideration was not truly stated.

W. G. S. Schwabe, for the appellant. The ground of the decision in the Court below was that the bill of sale was subject to a condition which did not appear in the document itself, and could not have been inserted therein without making the bill of sale void, as being not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

The letter of even date was only a collateral agreement, and not a "defeasance or condition" within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878: *Ex parte Popplewell* (1); *Ex parte Collins*. (2)

A condition is "a restraint or bridle annexed and joyned to a thing, so that by the not performance or not doing thereof the partie to the condition shall receive prejudice and losse, and, by the performance and doing of the same, commoditie and

(1) (1882) 21 Ch. D. 73.

(2) (1875) L. R. 10 Ch. 367.

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C. A. advantage": *Termes de la Ley*, cited in Stroud's Judicial
 1911 Dictionary, 2nd ed., vol. 1, p. 363. The letter was certainly not
 a condition as so defined. It may have been a condition prece-
 dent to the grantee's entering into the contract, but it was not a
 condition of the contract. It was in the nature of a collateral
 agreement, which need not be registered—*Ex parte Collins* (1);
Carpenter v. Deen (2); *Thomas v. Searles* (3); *Heseltine v.*
Simmons (4)—and does not affect the validity of the bill of sale in
 any way. But even if this letter is a condition of the contract
 this case is within *Edwards v. Marcus* (5) and the registration
 only is void, and the bill of sale is good as between the parties
 except as to the personal chattels comprised in it, and the appellant
 would be entitled to judgment upon his counter-claim on the
 grantor's covenant. The case does not come within *Smith v.*
Whiteman (6), and the bill of sale ought not to have been
 declared wholly void under s. 9 of the Act of 1882.

[FARWELL L.J. If this letter is written into the bill of sale,
 then it is a defeasance and this case is covered by *Smith v.*
Whiteman. (6)]

In that case there was held to be a defeasance of the
 security, but this is an entirely different case. There is no
 covenant or agreement in this document which is necessary for
 maintaining the security, and the covenant or agreement in
 respect of which default in performance will warrant a seizure
 must be one necessary for maintaining the security. The power
 of seizure does not apply to breach of a negative covenant:
Hyde v. Warden. (7)

The effect of this document is no greater than that of a
 guarantee by a third person. If it is a collateral agreement it
 does not come within the mischief contemplated by the Act.

[FARWELL L.J. It seems to me that the finding of the jury
 brings this case directly within *Smith v. Whiteman*. (6)]

The jury did not find that the letter was any part of the trans-
 action in this case. The question put to them was whether the

(1) L. R. 10 Ch. 367.

(2) (1889) 23 Q. B. D. 566.

(3) [1891] 2 Q. B. 408.

(4) [1892] 2 Q. B. 547.

(5) [1894] 1 Q. B. 587.

(6) [1909] 2 K. B. 437.

(7) (1877) 3 Ex. D. 72.

grantee would have advanced the money without the agreement. The grantee may have meant that the letter should influence the borrower, but it was not in any way necessary for the maintenance of the security. But if it is to be so regarded, then it can be put into the bill of sale as a defeasance or condition, and the registration only will be void under s. 10, sub-s. 3, of the Act of 1878. In *Smith v. Whiteman* (1) the clause was that the full amount was to be called in on breach of the condition. That is not so here.

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Ritter and *J. R. Macoun*, for the respondent. This is either a condition for defeasance of the security within s. 10, sub-s. 3, of the Act of 1878, or it is a covenant necessary for maintaining the security, and in either case it ought to have been inserted in the bill of sale, and as it would have avoided the bill of sale if it had been there, the bill of sale is absolutely void under s. 9 of the Act of 1882: *Smith v. Whiteman*. (1)

The dictum of James L.J. in *Ex parte Collins* (2) was disapproved in *Edwards v. Marcus*. (3) This is not a collateral agreement, it is a condition which "defeats or qualifies an estate": per Jessel M.R. in *Ex parte Popplewell*. (4) The condition not to borrow limits and modifies the estate and right of the borrower, and *Thomas v. Searles* (5) shews how seriously such a condition does affect the estate of the borrower in his goods. In the bill of sale there is power to seize when the rent and rates fall into arrear. There were several successive renewals in this case, the whole object being to keep the security free so that the mortgagee might pay the rent from time to time if required.

Schwabe in reply. If this bill of sale is void as to personal chattels only, then the further point on appeal, namely, whether the consideration was truly stated, will not arise.

Cur. adv. vult.

Dec. 16. FARWELL L.J. The first question in this appeal is what was the true contract between the parties? The jury

(1) [1909] 2 K. B. 437.

(3) [1894] 1 Q. B. 587.

(2) L. R. 10 Ch. 367.

(4) 21 Ch. D. 73, 81.

(5) [1891] 2 Q. B. 408.

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have found that the bill of sale, which is in the usual form, was given after the letter of February 18, 1910, was signed, and that the signature of the letter was a condition of obtaining the advance. In my opinion this finding amounts to a finding that the first statement in the letter is untrue, and that the letter and bill of sale were all one transaction and intended to secure one debt. There is therefore one contract in two documents, and if there is anything in either document which sins against the Bills of Sale Acts the bill of sale must be set aside: *Edwards v. Marcus*. (1) Now if the contract in the letter not to mortgage the chattels or to borrow from any other loan office until the whole debt had been repaid had been inserted in the bill of sale, a breach thereof would have been ground for seizure and sale—i.e., it would have been a defeasance of the bill of sale within clause 1 at the end of that document.

It was argued that such a covenant is not “necessary for maintaining the security,” but it is not open to a money-lender who inserts such a provision to say that it was unnecessary when he can suggest no other reason for its insertion. Whether its real object be that suggested by counsel for the respondent is not material. It is enough to say that the covenant by itself is worthless unless it is meant to operate as a defeasance by virtue of the provisions in the bill of sale. It follows that as the covenant ought to have been inserted in the bill of sale, and if so inserted would have operated as a defeasance, the bill of sale is void.

The case is, I think, covered by *Smith v. Whiteman* (2) in this Court. In that case the document which was read as part of the transaction contained not only the covenant, but the defeasance as well, so that both a new covenant and a new defeasance clause were added to the bill. Here the defeasance is left to take effect under the bill of sale by force of reading the covenant into the bill of sale—i.e., the causes of the defeasance provided by the bill of sale are increased by the addition of two others not specified in the bill; but the effect is the same in both cases; a cause of defeasance is added which is not in the bill. I wish to guard myself against being supposed to decide that the bill of sale would

(1) [1894] 1 Q. B. 587, 597,

(2) [1909] 2 K. B. 437.

have been good if the covenant had been inserted therein. It by no means follows that because a money-lender is estopped from saying that a covenant is not necessary for his security the Court is bound so to hold. I will only add that in *Smith v. Whiteman* (1) the Lord Chief Justice says: "The schedule to the Act of 1882 allows certain terms to be inserted in the bill of sale besides those in the form; it is difficult to say what may be the limit of such insertion, but such a condition as that in the present case is certainly not within that limit. Such a condition was obviously not allowed by the Act of 1878, and therefore the bill of sale would have been void if the condition had been written into it; and the bill of sale not being a good one under the Act of 1882, the right of the defendants to recover on the counter-claim is gone." It is not the case before us and I will express no opinion of my own upon it.

There are three possible cases: (1.) where neither covenant nor defeasance is in the bill of sale; that is *Smith v. Whiteman* (1); (2.) where the covenant is not, but the defeasance clause, the operation of which is extended by the covenant, is in the bill of sale; that is the present case: (3.) where both covenant and defeasance clause are in the bill of sale, and that does not arise here. If further authority were needed I think that it is to be found in *Pettit v. Lodge* (2), which was, if I may say so with all respect, rightly decided. I think this appeal fails on this point.

COZENS-HARDY M.R. I agree.

Appeal dismissed.

Solicitors: *Raphael & Co.; J. K. Torkington.*

(1) [1909] 2 K. B. 437.

(2) [1908] 1 K. B. 744.

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[IN THE COURT OF APPEAL.]

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WIXON AND OTHERS v. THOMAS (No. 2).

Feb. 8.

Justice of the Peace—Poor Rate—Exemption—Property acquired and used for the Purposes of the Crown—Territorial Force—County Association—Houses occupied by Non-Commissioned Officers of Regular Army acting as Instructors of Territorial Force—Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9).

Houses acquired by a county association under the Territorial and Reserve Forces Act, 1907, for use, and in fact used, as residences for non-commissioned officers of the Regular Army employed as instructors of the Territorial Force, are occupied by servants of the Crown for the purposes of the Crown, and are therefore exempt from rateability to the poor rate.

Decision of the Divisional Court affirmed.

Wixon v. Thomas [1911] 1 K. B. 43, on this point approved.

THIS was an appeal from the decision of a Divisional Court consisting of Lord Alverstone C.J. and Pickford and Lush JJ. upon a special case stated under Baines' Act, 12 & 13 Vict. c. 45, s. 11. The question arising upon the appeal was as to the rateability of premises occupied by non-commissioned officers of the Regular Army employed as instructors of the Territorial Force.

On September 15, 1909, the justices of Southend ordered a distress warrant to issue in respect of the rates upon 10, Christchurch Road, Southend, in the occupation of William Wixon, a sergeant instructor of the Territorial Force, and similar orders were made in respect of 35, Windsor Road, and 32, Gordon Road, in the occupation of William Lambert and Frederick Burrows respectively.

On the application of the Crown, the justices stated special cases, and appeals were entered from the rate itself to the Chelmsford quarter sessions in all three cases. The special cases came on for argument in the Divisional Court before the Lord Chief Justice and Pickford and Coleridge JJ., when judgment was given in favour of the Crown: see [1911] 1 K. B. 43. It was then arranged, in order to obtain a decision of the Court of Appeal

upon the point, that in all three cases orders should be made for one special case to be stated under Baines' Act.

The following special case was accordingly stated :—

1. On the 9th day of November, 1909, a rate was made for the relief of the poor for the parish of Prittlewell in the county of Essex and payment of such rate was duly demanded from the appellants.

2. The premises in respect of which such demand was made were respectively described in the rate-book as under :—

No.	Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Gross Estimated Rental.	Rateable Value.	Rate at 1s. 2d. in the £.
4982	Wixon, William ...	Allen, E. ...	House ...	10, Christchurch Road	£ 30 0 0	£ 24 0 0	£ 1 8 0
2807	Lambert, William .	Dowsett's Exors.	House ...	35, Windsor Road	21 0 0	17 0 0	0 19 10
9046	Burrows, Frederick	Talbot, A. ...	House ...	32, Gordon Road	25 0 0	20 0 0	1 3 4

3. The appellants duly objected before the assessment committee having jurisdiction in the premises, but failed to obtain relief, and thereupon they respectively gave notice of appeal against such rate to the quarter sessions for the county of Essex. The said appeals were entered and respited, and the same have been from time to time respited pending the determination of the question of law stated in this case to which the parties have agreed.

4. The appellants are non-commissioned officers of the Regular Army, and at the date of the rate were acting as sergeant instructors to units of the Territorial Forces (created under the Territorial and Reserve Forces Act, 1907), and they were quartered at Southend-on-Sea for the purpose of discharging their duties in connection with the Territorial Forces.

5. The premises in respect of which the rate in question was made on the appellants and which are hereinafter more particularly described were hired by the County Association of Essex (being a county association formed under Part I. of the Territorial and Reserve Forces Act, 1907) for the purpose for which they were used with the sanction of the Army Council. A copy of the

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agreement under which the premises respectively were hired and a print of the order signified under the hand of a Secretary of State made by His Majesty under s. 7 of the Territorial and Reserve Forces Act, 1907, and of the regulations put in force by such order are annexed to and form part of this case.

6. In each case the appellant with his family lived on the premises in respect of which he was rated, which in no way differed from an ordinary dwelling-house and formed one of a continuous row of private houses in the road.

7. In each case the appellant by his engagement in the Regular Army was entitled to quarters or allowance in lieu of quarters if not provided. The premises being provided by the county association he received no allowance in lieu thereof, but he received under the said regulations certain allowances for fuel and light and in respect of furniture provided by him. It was compulsory for him to reside in the house provided for him, but he was liable to be shifted, and the premises were liable to military inspection.

8. The premises 10, Christchurch Road (in which the appellant Wixon lived) comprised six rooms, a bath-room, kitchen and scullery, of which rooms one was used as an office, and two were used for stores in connection with the Territorial Force.

9. The premises 35, Windsor Road (in which the appellant Lambert lived) comprised one room and a kitchen and scullery downstairs, and three bedrooms upstairs. The room downstairs was used as a recruiting office and fourteen suits and some rifles were stored there.

10. The premises 32, Gordon Road (in which the appellant Burrows lived) comprised one sitting-room, kitchen and scullery, and three bedrooms. No stores were kept on the premises, nor did the appellant perform any of his duties as sergeant instructor there.

11. Subject as above stated the premises were in each case used by the appellant for residential purposes as a private individual.

12. The rent of the premises was in each case paid by the county association out of money provided by the Army Council.

13. It is contended for the appellants :—

(1.) That in each case the appellant though living on the premises was not the occupier for rating purposes ;

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(2.) That the premises were either through the appellants or through the county association occupied for the purposes of the Crown and that the appellants were not rateable in respect thereof ;

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(3.) That the appellant Wixon and the appellant Lambert were not in occupation of the rooms used for the purposes of the Territorial Force as above mentioned, and that this rendered the rate which the rate-book shewed to be on the whole house bad.

14. It is contended on behalf of the respondent as follows : —

(1.) That in each case the appellant was in occupation in fact and in law and the house was not exempt from rateability ;

(2.) That in each case the appellant had an independent occupation and the right to occupy the house was given to him by his employers as part of his remuneration ;

(3.) That the mere fact that the appellant in each case was removable at the pleasure of the Crown did not exempt the house from rateability ;

(4.) That though some rooms in the house of the appellant Wixon and a room in the house of the appellant Lambert were used as store rooms or otherwise for the purpose of the Territorial Force, such user did not affect the character of the occupation of the whole house, which was for the benefit of the appellant in each case.

15. The Court is asked to decide the questions of law above stated and it is agreed between the parties that a judgment in conformity with the said decision and for such costs as the Court shall adjudge may be entered on motion by either party at the said quarter sessions next after the decision shall have been given, and that the judgment may be entered accordingly and have full force of law.

This special case came before the Divisional Court on May 19, 1911, the proceedings being purely formal and judgment being given without argument in favour of the Crown.

It was thereby ordered that judgment be entered for the appellants and that a certain rate made on or about November 9, 1909, for the relief of the poor of the parish of Prittlewell in the

C. A. county of Essex, whereby the said appellants were severally rated
1912 in respect of certain premises in the special case described, be
quashed.

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From that judgment the rating authority now appealed.

Hohler, K.C., and *F. Hinde*, for the rating authority. The claim for exemption from rating in this case is based upon the prerogative of the Crown. It extends to occupation by the Crown by itself or by its servants, and further to occupation for the purposes of the government of the country. Beyond that it does not go. It does not apply to ordinary houses used merely as residences for officers of the Crown. The real question is as to occupation. In this case the occupation is that of the respondents themselves. The county association has let the premises to them and they live there instead of receiving their allowance for quarters. Under these circumstances they are not in occupation for the purposes of the Crown. The exemption depends entirely on the occupation and not on the title to the property.

There is no authority for the proposition that where a non-commissioned officer has assigned to him lodgings which he is obliged to occupy the premises are exempt. The case of barracks is, of course, different. They are directly occupied "for the purposes of the Crown."

If the real occupier is not exempt the mere using of one or more rooms for the purposes of the Crown does not exempt the whole of the premises.

[COZENS-HARDY M.R. Is not the Crown really in occupation through the association?]

No. The association is created by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9). It is not the servant of the Crown.

The principle is laid down by Lord Westbury in *Mersey Docks v. Cameron* (1), where he says at p. 505 that the public purposes to make an exemption "must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown."

These residences were in no sense necessary for the government of the country. The leasing of them by the association was ultra vires.

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There is here no occupation for the purposes of the Crown; it is simply the beneficial occupation of the respondents themselves and their families of premises in respect of which they are rateable: *Reg. v. West Derby* (1); *Coomber v. Justices of Berks* (2); *Martin v. Assessment Committee of West Derby* (3); *McHarg v. Assessment Committee of Stoke-upon-Trent* (4); *Tunncliffe v. Overseers of Birkdale* (5); *Showers v. Assessment Committee of Chelmsford Union*. (6)

The only exemption is where the Crown is the occupier, that is to say, where the Crown is personally in occupation, or in occupation by persons who are in the position of servants of the Crown, and therefore do not occupy for themselves. This case does not come within that exemption.

Sir Rufus Isaacs, A.-G., and *Rowlatt*, for the respondents, referred to *Reg. v. Stewart* (7) and *Reg. v. Foster*. (8)

[They were stopped by the Court.]

COZENS-HARDY M.R. This is an appeal from an order of the Divisional Court. In substance it is an appeal from a decision of another Divisional Court in certain proceedings between the same parties, reported [1911] 1 K. B. 43, but in that case no appeal could be brought to this Court because of the nature of those proceedings. The question arising for decision upon this appeal is whether the three respondents (appellants from the rate) are or are not liable to be rated in respect of the occupation of three houses at Prittlewell in Essex where they reside. Who are the respondents? They are non-commissioned officers in the Regular Army, and at the date of the rate were acting as sergeant instructors to units of the Territorial Forces, and they were quartered at Southend-on-Sea for the purpose of discharging their duties in connection with the Territorial Forces.

(1) (1875) L. R. 10 Q. B. 283.

(2) (1883) 9 App. Cas. 61.

(3) (1883) 11 Q. B. D. 145.

(4) (1884) 48 J. P. 775.

(5) (1888) 20 Q. B. D. 450.

(6) [1891] 1 Q. B. 339.

(7) (1857) 8 E. & B. 360.

(8) (1857) 8 E. & B. 380.

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Now it is clear that they went there as non-commissioned officers of the Regular Army by command of the proper Army authorities and in pursuance of the regulations under the Territorial and Reserve Forces Act, 1907, to discharge their duties. The case finds these facts: The Essex Territorial Association took a lease or leases of three houses, and in each of these houses one of the respondents lived. In each case the respondent, by his engagement in the Regular Army, was entitled to quarters or an allowance in lieu of quarters if not provided. The premises being provided by the county territorial association, he received no allowance in lieu thereof, but under the regulations he received certain allowances for fuel and light and in respect of furniture provided by him. It was compulsory for him to reside in the house provided for him, but he was liable to be shifted, and the premises were liable to military inspection.

As to Wixon's house, one of the rooms was used as an office and two were used for stores in connection with the Territorial Force. His family occupied the rest of the house. As to Lambert's house, one room downstairs was used as a recruiting office and fourteen suits and some rifles were stored there. As to Burrows' house, which comprised one sitting-room, a kitchen and scullery, and three bedrooms, no stores were kept on the premises, nor did he perform any of his duties as sergeant instructor there. Then the case states: "Subject as above stated the premises were in each case used by the appellant" (respondent on the appeal) "for residential purposes as a private individual."

Under those circumstances it was contended by the respondents, and the view has been upheld by the Divisional Court, that they were exempt from rating on the ground that the property was occupied for the purposes of the Crown by the territorial association. The respondents are in the plainest possible manner servants of the Crown. They are non-commissioned officers in the Regular Army and are ordered to live in these houses by the competent authorities and are there for the purpose of discharging their duties as His Majesty's servants, and upon that ground, according to undisputed authorities, they have freedom from rating. It is said on the other hand that the whole proceeding was ultra vires of the association, they having no power to take a lease of these houses

or to provide the accommodation which they did for the respondents. That is a proposition which seems to me incapable of being supported. I think it is quite clear that it was intra vires of the territorial association to take a lease of these houses and to use them bona fide for the purpose of the Territorial Forces which were under their charge. Then it is said that the respondents are not there really in their character of servants of His Majesty, that they are there simply as occupiers, and that the right of occupying the houses is equivalent to an extra payment which they would get if they did not occupy the houses. That seems to me to have no bearing on this matter. This is not a case in which the undoubted ancient common law rule as to the servants of the Crown not being liable to be rated in respect of the premises they occupy in that character has descended and become applicable under analogous public conditions, but is a case of undoubted servants of the Crown occupying premises by command of the Crown and for the purposes of the Crown. If authority be required to support this view, the case to which the Attorney-General has called our attention, namely, *Reg. v. Foster* (1), is a direct and explicit authority.

Both on principle and authority I think that the view taken by the Divisional Court in this matter in the case reported in [1911] 1 K. B. 43 was perfectly right, that there is no ground for questioning it, and that this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion and for the same reasons.

BUCKLEY L.J. The sole question here is whether the Crown is in occupation by its servants, or whether the three respondents are in occupation, they being in fact the servants of the Crown.

The material facts are that the premises in question are demised to the Territorial Forces Association of the county of Essex, and that the rent is paid by the county association out of moneys provided by the Army Council. The lessees, therefore, are persons who, for the purpose of the military

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C. A. service of the country, have taken these premises, and the rent is
1912 paid by the Crown. In that state of facts it appears that these
men are there not in the exercise of any right of occupation.

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tion at all. They are there in pursuance of their duty. They
Buckley L.J. are told to go there for the purposes of the instruction which
they owe it to the Crown to give to the Territorial Forces.
They are persons, I think, who are placed there by the Crown in
performance of their duty to the Crown, and the occupation of
the premises is in the Crown by the servants of the Crown.
Under those circumstances the premises are not rateable.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co., for W. & F. Gregson,
Southend-on-Sea; the Treasury Solicitor.*

G. A. S.



